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A

TREATISE

OF THE

LAW OF TITHES

COMPILED IN PART

FROM SOME NOTES

OF

RICHARD WOODDESON, Esq. D. C. L.

By Sir SAMUEL TOLLER, Knt.

ADVOCATE GENERAL AT MADRAS.

THE SECOND EDITION,

WITH CONSIDERABLE ADDITIONS.

Ornari res ipsa negat; contenta doceri.

Manil.

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TO THE

PRESENT EDITION.

SINCE the original publication of this Work, Sir Samuel Toller has been appointed Advocate General at Madras. Previously to quitting this country for India, he corrected the Work throughout, and made considerable additions to it. He also drew up an Analysis of the Work, and an Index of the Names of Cases cited in it; and left the whole prepared for publication. The Work is now printed from Sir Samuel Toller's Papers. The Statutes and principal Cases relating to the subject, which have been passed and decided since Sir Samuel Toller left this country, are noticed in the Addenda at the end of the Work.

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TO THE

FIRST EDITION.

WHATEVER difference of sentiment may exist in respect to the policy of the Law of Tithes, and the expedience of establishing that species of provision for the clergy; yet as it constitutes, and has so long constituted, an important part of the Laws of England, an attempt to methodise, and to explain it, to disentangle its difficulties, and to illustrate its obscurity, can by no party be regarded with disapprobation. This task it has been the object of the following Treatise to perform. Dr. Wooddeson having collected a variety of Notes, with a view to extend and to prepare them for a publication upon the subject, was compelled by an ill state of health to relinquish his purpose, before it was much more than half accomplished; and he did me the honour of communicating to me his papers, with a request that I would revise them, and complete the work. Encouraged by the confidence reposed in me by my learned friend, I ventured to comply with his ap-

plication, and beg leave to submit to the Public the result of our joint labours, trusting that the arduous nature of the undertaking will be deemed some apology for the imperfections which may be discovered in its execution.

SAMUEL TOLLER.

Lincoln's Inn,
October 15*th*, 1808.

THE CONTENTS.

Analysis of the Work - - - - Page ix
Addenda - - - - - - - xxiii

CHAPTER THE FIRST.

Historical Introduction, - - - - - 1

CHAPTER THE SECOND.

Of Tithes, as to whom due; and their legal Nature and Properties, - - - 12

CHAPTER THE THIRD.

Division of Tithes, and Matters between Rector and Vicar, - - - - - - - 41

CHAPTER THE FOURTH.

Things Tithable of Common Right, and the Manner of Tithing them respectively, - 62

CHAPTER THE FIFTH.

Things Tithable by Special Custom, - - 148

CHAPTER THE SIXTH.

Things not Tithable, - - - - - 155

CHAPTER THE SEVENTH.

Exemptions General, - - - - - 164

CHAPTER THE EIGHTH.

Exemptions Partial, - - - Page 183

CHAPTER THE NINTH.

Tithes in London, - - - - - - 229

CHAPTER THE TENTH.

Remedies for the Recovery of Tithes, or their Value, - - - - - - - - 248

APPENDIX, No. I.

Catalogue of the greater Monateries dissolved by Stat. Hen. 8. - - - 295

No. II.

City Livings, and their Value - - 304
Table of Names of Cases - - - 307
Index - - - - - - - - 317

AN

ANALYSIS

OF THE FOLLOWING WORK.

CHAP. I.

HISTORICAL INTRODUCTION. *Page* 1

SECT. 1.

OF Tithes before their legal establishment. *ib.*

SECT. 2.

Of the establishment of Tithes on the continent of Europe, in the time of Charlemagne, in the year 778, and the fourfold distribution of them at that period; and herein of the perversion of Tithes, by their being granted to laymen, and afterwards to spiritual corporations, the former of which was prohibited by the council of Lateran, in the year 1180; and the latter, by Pope Innocent's Decretal Epistle, in the year 1200. 2

SECT. 3.

Of Tithes in England. 6

If Tithes were co-eval with the planting of Christianity in this island, the payment of them may be referred to times antecedent to the Saxon dynasty. *ib.*

And on that supposition, the time of the mission of Augustin the monk, from Gregory the Great, about the end of the sixth century, was not the earliest period of their existence. *Page* 6

Mission from Pope Hadrian the First, in 786, of legates, who procured an ordinance *de decimis dandis*, throughout the whole or the greater part of the Saxon heptarchy. *ib.*

Tithes ordained by the Anglo-Saxon laws. 7

Individual churches exclusively endowed of tithes, by the laws of King Edgar, about the year 970. *ib.*

And herein of the probable origin of parishes. 8

Pope Innocent's above-mentioned Decretal Epistle, in the year 1200, enjoining the payment of tithes to the parochial incumbent, the foundation of the establishment of tithes in this country. 9

CHAP. II.

Of Tithes as to whom due, and their legal nature and properties. 12

Definition of tithes in general. *ib.*

From whom, and to whom, payable. *ib.*

Tithes within parishes, due of common right to the rector. 13

King entitled to tithes of places extra-parochial. *ib.*

Lands, parcel of a parish by prescription, or act of parliament. *ib.*

The nature of assarted lands. *ib.*

This royal title referable to the king's sustaining a spiritual and temporal character. 14

The king, at common law, capable of prescribing for tithes on the same principle. *ib.*

In respect of the general right of incumbents, as well *de facto* as *de jure*. *ib.*

Title of rector, ecclesiastical or lay; and of vicar. 15

In respect of their successors. 16

Of a portion of tithes, and its incidents. 17

Of the alienation of the inheritance in impropriate tithes. 24

Of leases of tithes by spiritual incumbents, or corporations, or by lay impropriators; and the statutes relative to such leases. *ib.*

Of affirming voidable leases. 27

Of Sequestrations:— 35

1. To levy a debt recovered by judgment against incumbent. *ib.*

2. Where the right to the benefice is in controversy. *ib.*

The course of proceeding on a sequestration. *Page* 36
3. Sequestration, a remedy for dilapidation; and herein of the distinction between impropriations and appropriations. 37
4. Sequestration, in consequence of the avoidance of a benefice. 39
5. In case of non-residence. *ib.*
Statute 43 Geo. 3. c. 84. relative thereto. *ib.*
Sequestration only a temporal suspension. 40

CHAP. III.

Divisions of Tithes, and matters between Rector and Vicar. 41

Different classes of Tithes:— *ib.*
1. Predial, mixt, and personal. *ib.*
Nature of predial tithes derived immediately from the ground; as corn, hay, and other fruits of the earth. *ib.*
Obligation of setting out tithes applicable to such only as are predial. *ib.*
Nature of mixt tithes, produced mediately through animals deriving their sustenance from the ground. 42
Agistment tithe predial and not mixt. *ib.*
Nature of personal tithes, arise from the personal labour of the parishioners. 43
More considerable formerly than they are at present. *ib.*
Only species of personal tithes now payable are— 44
1. Mills, and how payable, partake of a predial nature. *ib.*
2. Fish, and how payable. 48

II.—*Division of Tithes, great and small.* 50
Corn and hay, great tithes. *ib.*
And wood, generally in the absence of local usage to the contrary. *ib.*
Small tithes are all other predial tithes; comprising even seeds, which, when ripened, would be great tithes. *ib.*
Mixt, and personal tithes, are all small tithes. *ib.*
The denominations of great and small tithes depends on their intrinsic nature, not their quantity or mode of cultivation. 51

III.—*Rectorial and Vicarial.* *ib.*
Respective rights of rectors and vicars, and herein of endowment and dissolution of vicarages. *ib.*

Title of vicars by prescription. Page 54
Endowment of vicarages how construed. 55
Of parochial chapelries, and perpetual curacies. 58
Question between rector and vicar, whether tithes are great or small. 59
The following adjudged to be small tithes; to which vicars, if endowed with small tithes generally, are entitled :— ib.
1. Garden herbs, roots, and fruit. ib.
2. Hops. ib.
3. Potatoes. ib.
4. Turnips. 60
5. Saffron. ib.
6. Coleseed. ib.
7. Teazel. ib.
8. Rape-seed. ib.
9. Woad. ib.
Without special endowment or prescription, peas and beans great tithes, and belong to rector. ib.
The true distinction depends on the nature, not the quantity or locality, of the articles tithable. 61

CHAP. IV.

Things Tithable of common right, and the manner of Tithing them respectively. 62

Tithes not universally of yearly increase. ib.
That description inapplicable to mixt and personal tithes. ib.
Though land having once borne the annual burthen of tithes, shall not be charged with tithes in the same year. ib.
Yet clover, having more frequent increase than once a year, pays tithe as often as it is produced. ib.
So turnips. ib.
On the other hand; wood, though not renewed annually, is tithable.
So saffron. ib.
Of common right aftermath, without prescription against it, is titheable. 63
But for after-pasture, no tithe is due. 64
Tithe payable for hay and corn, or any species of grain produced from orchards, though the fruit thereof be tithed. ib.
Vendee of grass, not severed, must pay the tithe. 65
Such also the law in respect of nursery plants and corn. ib.
Vendor liable, if sold after severance. ib.

In like manner, vendor and vendee thus respectively liable, in regard to wood. *Page* 65

With these exceptions, predial tithes become due once a year. The principal of which are:— *ib.*

1. Corn and grain. 66

These to be fairly set out pursuant to statute Edw. 6. under pain of forfeiting treble the value. *ib.*

By that statute, lawful for the tithe-owner to see them set out, and undisturbedly to take them away. *ib.*

A prescription excluding him from seeing them set out, void. *ib.*

By the general law, no notice of setting them out necessary. 67

But such notice may be requisite by virtue of a local custom. *ib.*

Such custom supported by slight evidence. *ib.*

Where such custom prevails, an hour's notice insufficient. *ib.*

Such custom must be pointedly alleged. *ib.*

Late occupier's interest in the land having expired when he carried the corn away, no excuse for not setting out the tithes. 68

Parson has no right to set out the tithes himself, without the owner's consent. 69

Corn, on no pretence, to be removed till the tithes are set out. *ib.*

How tithes of wheat set out by special custom. 70

The setting out of tithes, though originally proper, may be construed fraudulent by the subsequent conduct of the occupier. 71

Parson has convenient time for removing his tithes. *ib.*

Consequences of his failing to do so. *ib.*

The general mode of tithing wheat. 72

When parishioner, by particular usage, takes additional trouble in that respect beyond his general duty. 73

For rakings of corn, no tithes payable, unless fraud. 74

Each article to be tithed after severance, when he fair tenth can be ascertained, and herein of tithing barley and oats, peas and beans. 75

Parson to have access to the tithes set out by the usual way. 77

In collecting his tithes, to be put to no superfluous trouble 78

II.—*Hay and the like Articles.* 79

How tithable of common right. *ib.*

How by custom. *ib.*

When tithe of grass set out, occupier not bound to make it into hay. 80

Parson has a right of way over occupier's ground to make tithe grass into hay. *ib.*

Has reasonable time to take his said tithes, and dry them before he carries them away. *Page* 80

Tithe in general due for fodder Of compensation in lieu of tithe of hay. 81

Clover grass equally tithable. 82

So it seems is cinquefoil. *ib.*

So clover seed. *ib.*

Ordinary grass, clover, artificial grass, tares or vetches cut green, when given to cattle used in husbandry, not tithable. 83

Of tithing rapeseed, *ib.*

Fern, *ib.*

Heath, 84

Furze, *ib.*

and

Broom. *ib.*

Special cases of exemption of these articles, as when spent in the parishioner's house; or, in case of furzes, they are used to make penns for his sheep. *ib.*

Compensation given by statute, in lieu of tithes, of hemp, flax, and madder. *ib.*

III.—*Agistment tithe.* *ib.*

due of common right. 85

demandable against the occupier of the land, and not the owner of the beasts. *ib.*

unless they are depastured on a common. *ib.*

If occupier, after the corn is cleared, sows the land with turnips, he is liable to pay agistment tithe. 86

Beasts agisted must be barren and unprofitable. *ib.*

When pasture is eaten by cattle, some profitable, and others barren. *ib.*

What are deemed profitable cattle. *ib.*

Claims of rectors of distinct parishes relative to agistment tithe. 88

Beasts employed in husbandry generally exempt. 92

Not so when depastured in one parish, and used in husbandry in another. *ib.*

Nor where they cease to be so employed. 93

So milch cows, and young, used or reared for the plough or pail, are exempt. 95

So all animals feræ naturæ, as deer and conies, are exempt. *ib.*

So as it seems saddle horses. 96

But coach horses are liable. *ib.*

Inn-keepers, or post-masters, liable to tithes. *Page* 96
For herbage eaten for his horses kept for hire, and agisted on land he occupies, or where he has common of pasture. 97
In what manner satisfaction is to be rendered for agistment tithe. *ib.*

IV.—*Wood Tithable of common right.* 98
Gross, or great wood, of the age of 20 or 40 years, or of greater age, by statute 45 Edw. 3. exempt from tithes. 100
What should be deemed gross wood: 101
Such trees as are timber by common law; as oak, ash, and elm. *ib.*
Such as are timber by custom of the country; as beeches and other trees. *ib.*
Of timber trees so privileged by the statute, no tithes are payable either of the bodies, barks, lops, or tops, unless fraud. *ib.*
Instances of such exception: *ib.*
Such trees having once obtained exemption from tithes, retain it, though they become dry and rotten; or, as they are then called, dotards. 102
When the loppings are liable. 103
Not only beeches, but birches, horse-chesnuts, limes, aspen, cherry trees, and willows, may be timber trees by custom. 105
Alders, hazels, hollies, and others, are of so mean account, as never to have been held within such custom, and of whatever age or size, pay tithes. *ib.*
Tithes payable of mast and acorns; but acorns must be gathered and sold to be tithable. 106
Broom made into bavins, and wood growing in hedges tithable. *ib.*
Tithable quality of wood not to be determined by the subsequent application of it, unless to purposes of agriculture and husbandry. 108
When so applied, it is exempt: *ib.*
1. Wood employed to hedge or fence corn, where the parson has tithe of corn, not tithable; so hop-poles and their barks are exempt. 109
So oziers cut to make hurdles for sheep. *ib.*
So wood for the maintenance of the plough or pail, or used in making or repairing implements of husbandry. *ib.*
2. Firewood, cut and consumed in a dwelling-house in the same parish, is exempt. 110
3. So is wood cut and burnt in making bricks used in the repairs or enlargement of parishioner's mansion, within the parish, for his necessary habitation. 112
But such exemption does not extend to buildings for pleasure. *ib.*
Tithe of wood predial, and must be set out pursuant to the statute. 113

In what manner set out. *Page* 113
Question in regard to tithes, as between vendor and vendee of wood. *ib.*

V.—*Hops.* 114
The cultivation of hops comparatively modern. *ib.*
Of the predial kind. 115
Mode of setting out tithes of hops. *ib.*

VI.—*Roots, Seeds, Fruits, Garden Stuff, and various products of the earth.* 118
Mode of tithing them. *ib.*
And herein of hot-house plants; as pine-apples, grapes, and other exotics. 120

VII.—*Honey, and Wax of Bees, of the Class of Predial Tithes.* 125
Bees themselves not tithable, because feræ naturæ. *ib.*
Honey and wax how tithed. *ib.*

Next as to mixt tithes: and they are— 126

VIII.—*Milk due of Common right.* *ib.*
The mode of tithing milk. *ib.*
Prescriptions in regard thereto. 127

IX.—*Wool.* 135
Tithe of wool due of common right when it is clipped. *ib.*
prescriptions relative thereto. *ib.*
due, though the sheep die, or they are killed for domestic consumption. 137
Wool of lambs tithable, though tithe were paid of lambs in their wool only two months before it being a new increase. *ib.*
Where sheep in one flock, or under one shepherd, every owner shall pay tithe of his individual sheep separately. *ib.*
Tithe of wool and lambs payable where the sheep are shorn, or the lambs fall, unless fraud. 138
Parson has a right to inspect the tithing of wool. 140
Tithing wool by weight the fairer mode. *ib.*

X.—*Young Animals; namely, Lambs, Calves, Kids, Colts, and Pigs.* 141
Tithed when weanable, unless custom confine the payment to a certain time or age. *ib.*
Prescriptions in regard to tithing young animals. 144

XI.—*The young of Poultry and tame Fowls.* *Page* 145

Heas, geese, and ducks, subject to the payment of tithes, either by the tenth of their young, or of their eggs, not of both; but whether out of the young or the eggs, depends on custom. *ib.*

Swans and turkies, as tame fowls, are tithable. *ib.*

But pheasants and partridges, as being feræ naturæ, are not tithable; not even if kept for breeding in any enclosed spot, and with their wings clipt. 146

XII.—*Eggs being the last species of mixt Tithes, how Tithable.* *ib.*

Customs in regard to eggs. *ib.*

In the last place, as to personal tithes, they consist, as above-mentioned, of mills and fish, the tithes of which are a tenth part of the clear profits. 147

CHAP. V.

Things Tithable by Special Custom. 148

Custom, definition of *ib.*

how distinguished from prescription. *ib.*

Difference to the rector in point of presumption, where things are tithable of common right, and where things are tithable by custom only. *ib.*

Nature of evidence to support a custom; books and other documents.

Tradition. *ib.*

Things tithable only by custom, are: 150

1. Houses for habitation, and how. *ib.*
2. Things of the substance of the earth, as quarries of stone, turf, tin, lead, brick, tile, lime, marle, coals, chalk, pot-earth, and the like. 152
3. Animals feræ naturæ, as deer, rabbits. *ib.*

CHAP. VI.

Things not Tithable. 155

Hounds kept for pleasure not tithable, collections of foreign birds and beasts, kept for amusement, independently of the wild nature of most of them, not tithable. *ib.*

With this exception, things not tithable by the general law, are exempt for the benefit of husbandry. *ib.*

As after-pasture agistment for beasts of the plough, wood used for plough-bote. *Page* 156

Head-lands, or as they are sometimes styled meres, balks, and butts in corn fields, large enough only for turning the plough. *ib.*

Barren heath, or waste ground, by statute Edward 6. for the term of seven years after the same shall be cultivated. *ib.*

What cases are comprehended within that statute, and its general operation. 157

CHAP. VII.

Exemptions general. 164

Such exemption depends not on any intrinsic quality of the articles, but on a collateral foundation. *ib.*

May be either general in its nature, called a prescription de non decimando, or of partial extent, and a substitution for tithe in kind, styled a modus decimandi, comprehending moduses and compositions. *ib.*

Mere non-payment of tithes, though from time immemorial, no discharge against an ecclesiastical rector, or as it seems against a lay-impropriator. *ib.*

Generally speaking, prescriptions de non decimando are illegal, except in cases falling within the principle that ecclesia decimas non solvit ecclesiæ, and therefore, 1. The king being persona mixta, is capable of prescribing in non decimando. 168

2. All ecclesiastical persons, as bishops, deans, prebendaries, parson, and vicars. And so a county or hundred may prescribe in non decimando in respect to articles. 169

3. There may be a prescription in non decimando, in respect to estates which formerly belonged to religious houses. 171

Exemption by Pope Pascal II. of all religious orders from the payment of tithes, in respect of lands in their possession, or dum propriis manibus excole. 172

Such exemption restrained by Pope Hadrian IV. to the three religious orders of Cistercians, Templars, and Hospitallers, called the privileged orders, being thus discharged from tithes ratione ordinis. *ib.*

Attempt by Pope Innocent II. but in vain, to extend such exemption to the order of Christ. *ib.*

But spiritual persons or corporations, capable of being wholly discharged from tithes by other means, as by real composition, by the Pope's bull of exemption, recognized by the law of England, or by prescription. 173

Exemptions of religious houses from tithes, ratione ordinis, restrained by the Council of Lateran in the year 1215, to those lands of which they were in possession before that Council. *Page* 173

Cistercians evaded such last-mentioned restriction, till prevented by statute 2 Hen. 4. *ib.*

The lands of abbeys, or religious bodies, dissolved by statute 17 Hen. 8. lost their exemptions from tithes. 174

The exemptions of the lands of abbeys and religious houses dissolved by statute 31 Hen. 8. preserved by the special provision of that Act. Such provision hath been held to extend to the Order of St. John of Jerusalem, dissolved by statute 32 Hen. 8. *ib.*

Hence resulted a new species of discharge from the unity of the possession of the parsonage and land tithable in the same person. 175

Incidents requisite to make such union thus effectual. *ib.*

Lands of religious houses, privileged ratione ordinis, having been exempt from tithes, only dum propriis manibus excolebantur, a party claiming such exemption must shew he is in the occupation and manurance of such lands. 176

But this exemption so narrowed only where the religious houses were privileged ratione ordinis. 177

If discharged by other means, the privilege of exemption not restricted to lands in their actual occupation. *ib.*

No objection to such general exemption, that the lands were in the occupation of a lessee under a lease by the abbey, subsisting at its dissolution. 178

But where an abbot being discharged of tithe, quamdiu in manibus propriis, in the reign of Edw. 4. made a gift in tail, and the abbey was dissolved by statute 31 Hen. 8. Held, that the donee of the issue should not be discharged. 179

Not requisite to such discharge, that the owner of lands, formerly part of the possessions of a greater abbey, should hold them in fee simple, or even have an estate of inheritance in them. *ib.*

Where lands were clearly discharged from tithes in the hands of a prior, and the priory vested in the king by statute 31 Hen. 8., the constant payment of such tithes ever since the passing of that act, shall not make the lands chargeable. 181

Nor shall such exemption be discharged by such general words in an Act of Parliament. *ib.*

CHAP. VIII.

Exemptions Partial. *Page* 183

Moduses and compositions. *ib.*
Modus a composition for tithes, which has existed from time immemorial. *ib.*
Various species of moduses. *ib.*
Parochial modus. 184
Farm modus. *ib.*
Modus must be, 1st. fixed and invariable. *ib.*
2. In its origin must have been beneficial to the parson. 197
3. It must be different from the article compounded for. 198
4. A modus for one species of tithes no discharge for the payment of any other species. 200
5. Must be as durable as the tithes discharged by it. 201
Lastly. It must not be rank. 202
These several incidents and properties illustrated, and herein of the manner of litigating moduses. 207
A modus not to be overturned on trivial grounds. 212
How a modus may be discharged, and tithes become payable in kind. 215
A real composition, an agreement made between the owners of land and the parson and vicar, with the consent of the patron and ordinary that such lands shall be exempt from tithes in consideration of some land, or real recompence allotted to the parson in satisfaction of them. 219
The consent of the patron and ordinary necessary to give it validity. 220
Statute 13 Elizabeth, prohibits all parsons and vicars from conveying the estates of their churches other than for three lives, or 21 years; and therefore no real composition made since that statute, good for any longer term, though made by consent of patron and ordinary. *ib.*
Distinction between a modus and composition real. The former must have immemorially existed; the latter must have commenced within time of memory, and its commencement should be shewn. 221
An agreement by the parson, patron, and ordinary, though confirmed by decree in equity, since stat. 13 Eliz. confined only the parties to the same. 222
Other species of composition than composition real, and what. 224
The composition must be certain. 225
Parol agreement for a composition good. *ib.*

Successor may confirm a composition made by his predecessor. *Page* 226
How payment of composition may be enforced. *ib.*
Notice of determining a composition. 227
Such notice may be objected to by defendant; he *may* insist on the composition as a modus. 228

CHAP. IX.

Of Tithes in London. 229

Before the dissolution of monasteries, the maintenance of the secular clergy appears to have arisen principally from voluntary oblations and personal tithes. *ib.*
At the Reformation the provision for the parochial clergy of London was adjusted by the order of the Lords of the Council, promulgated by proclamation, and afterwards established by stat. 27 Hen. 8. c. 27. *ib.*
The effect thereof. 230
Provisions of stat. 22 and 23 Car. 2. passed in consequence of the fire of London. 232
Decisions on the construction of the above-mentioned order and statute 37 Hen. 8. 233
Statute 37 Hen. 8. extends both to lay impropriators and spiritual persons. 246
Statute 22 and 23 Car. 2. extends to preaching ministers only. 247

CHAP. X.

Remedies for the Recovery of Tithes, or their Value. 248

I.—Of the Jurisdiction of the Spiritual Courts relative to Tithes. *ib.*
When the controversy arises between spiritual persons, and when between a spiritual person and a layman. *ib.*
How that jurisdiction is aided by statutes 27 Hen. 8. and 32 Hen. 8. and stat. 2 and 3 Edw. 6. 253
II.—Of the Jurisdiction of the Temporal Courts in regard to Tithes. 254
First, Of the Courts of Common Law. *ib.*
1. Of prohibitions. *ib.*
2. In respect to actions maintainable in the Courts of Common Law, by virtue of stat. 32 Hen. 8. and 2 and 3 Edw. 6. 258

Secondly, Of Courts of Equity, the Court of Chancery, and Court of Exchequer. *Page* 262

II.—The nature of the evidence adduced in suits and actions relative to tithes and herein of terriers. 267

IV.—In respect to costs of suits for tithes, and herein of tender of what is due for tithes. 283

V.—Of enforcing the payment of tithes by summary process, by virtue of statutes 7 and 8 Wm. 3. c. 6. and statutes 7 and 8 Wm. 3. c. 34. made perpetual by stat. 1 Geo. 1. stat. 2. c. 6. 286

Lastly.—In what manner tithes are recovered in the city of London. 290

Remedies for the same not restricted to such as are afforded by the statute Hen. 8. *ib.*

The particular jurisdiction created by that statute has not deprived Courts of Equity of their ancient jurisdiction. *ib.*

Construction of the above-mentioned statute 22 and 23 Car. 2. in regard to assessments for the clergy of London. 292

APPENDIX.

No. 1.

Catalogue of the greater monasteries dissolved by stat. 31 Hen. 8. 295

No. 2.

City livings and their value. 304

ADDENDA.

Page 56, 57.—In an action by the executors of the late George Earl of Dartmouth, upon the statute 2 and 3 Edw. 6. for not setting out the tithes of hay of a parcel of land, called the Four-day's-work-close, in the parish of Batley, in the county of York; at the trial before Thomson, B. at York, the plaintiffs made title to the tithes in question, under the Marquis of Halifax, to whom the same had been conveyed by an indenture of the 21st of October, 1676; and they produced copies of a bill and answer in a cause in the Court of Exchequer, tending to shew that the tithes belonged to the Earl of Dartmouth; and also gave parol evidence of the receipt of the tithes, or payments in lieu thereof, as far back as living memory could trace. The defendant gave counter evidence of title, the tendency of which was to shew that the right of the tithes was in the vicar of Batley, under an endowment of the vicarage, with the tithes of hay of the whole parish, in 1253, by Walter Gray, Archbishop of York, in the 37th year of his pontificate; and that the same appeared to have remained annexed to the vicarage after the dissolution of the monastery of St. Oswald de Rostell, by an ecclesiastical survey in the 26th H. 8. (1535), and by ministers' accounts in the 33 and 34 H. 8. The parish of Batley consisted of three townships, Batley, Morley, and Churwell; and there were three terriers proved by the defendant, of the dates of 1727, 1743, and 1748, each entitled "a true and perfect terrier of glebe and other possessions belonging to the church of Batley, &c." mentioning "the great tithes of Scolecroft, in the township of Morley," and also "Fineden composition-money for tithe-hay." But there was no evidence of the vicar having ever in fact taken the tithe of hay, or any composition for it. It was answered,

that as this evidence related to a period before the restraining statutes of the 13th Eliz. c. 10. and 13th Eliz. c. 20. and as there was no evidence that since those statutes the tithes of hay in this place had belonged to, or been enjoyed by, the vicar, it was open to the jury to presume, that before the restraining statutes the vicar, with the consent of the patron and ordinary, had conveyed away the tithes, in exchange for a valuable consideration, to some other monastery, the property of which, afterwards on its dissolution, went to the Crown, from which it passed into the hands of the grantee of this rectory, and this question went to the jury, who found a verdict for the plaintiffs. The Court of King's Bench being moved for a new trial upon the merits of the title, and upon another ground, not material to be noticed here, the Court refused the application; and per Lord Ellenborough, C. J. "I am inclined to think, that in 1253 the tithe of hay was in the vicar, under this endowment of the Archbishop of York, with the consent of the prior and his convent; but assuming, that under the endowment, the vicar was once well entitled to the tithe of hay, co-extensive with the limits of his parish, he might, before the restraining statutes, have granted it to another ecclesiastical person, with the consent of the patron and ordinary: there would then have been a portion of tithes dissevered from the vicarage, and there was evidence that it was so dissevered, from the conveyance of the tithe in 1676 to Lord Halifax, which after this disseverance, but prior to the restraining statutes, might have got into lay hands. We therefore want to pray in aid only this supposition as to these portions of tithe which appear to have been enjoyed, dissevered from the vicarage; that they were so dissevered, and in favour of modern enjoyment, which is the best interpreter of right, where documentary evidence does not exist, we will, in conformity with Lord Kenyon, who said, that he would presume two hundred deeds, if necessary, presume here that a disseverance took place. The actual perception of tithe hay, either in kind, or by composition, never appeared to be in the vicar from the time of the first endowment, but a perception of 1*s.* 4*d.* annually, for a considerable time, under a general composition with the rector, which though not so strong as if the rector had taken it in kind, will virtually include it, nothing appearing to the contrary. Therefore, there was not only evidence to be left in the balance to the jury, but that evidence preponderated in

favour of the rector's claim." Lady Dartmouth *v.* Roberts, 16 East, T. R. 334.

Page 69, 70.—In an action in the Court of Common Pleas, for not setting out the tithes of wheat amongst other things; *per curiam*, the tithe must be so set out, and the nine parts left so long, that the parson may have an opportunity of judging by the view whether the tithe is fairly set out or not. Halliwill *v.* Trappes, 2 Taunt. 55. In this case, the defendant first reaped or sheared one land, and as the reapers came back again to begin the next, they severed the tenth sheaf, and threw it into the furrow, and put up the other nine into shocks or stocks. Semble, that this was not a due mode of setting out the tithes.

Page 70, 71.—At the trial of an action on the case, for not taking away the tithes of corn alleged to be duly and properly set out, before Graham J. at Lancaster, it appeared that the plaintiff had crops of wheat and oats in 1809, and the wheat and part of the oats being ripe for cutting on the 21st of August, the plaintiff, on that day, sent notice to the defendant, who lived a mile and a half off, that he should begin to reap on the 24th, or as soon after as the weather would permit; and, in fact, he began on the 24th, and continued reaping till the whole was finished in about a fortnight. The wheat when cut was first bound up in sheaves, which were immediately set up in riders, each rider consisting of ten sheaves, four of which were set up on their ends against four others, and two more were placed roof-wise on the top of the rest, by way of protecting the whole against the weather. Part of the wheat was fit for housing on the 14th of September, and the defendant not having sent any person to see the riders set up, nor the tithe set out, the plaintiff sent his servant on that day to set out the tithes, and he took one sheaf from each rider, and set up every two sheaves so taken, one against the other; and if there were an odd tenth sheaf at the end of the row he put three together. He tithed the sheaves, as he swore, fairly and impartially, taking one promiscuously out of each rider without damage, and taking at every tenth sheaf one from the two uppermost or thatching sheaves. After thus separating the tithe-sheaves, the rest of the wheat was carried away to be housed in about two hours afterwards. The like was done by the

oats on the 22d of September; and of these, after the tithe-sheaves were thus separated, the remainder was carried off in half an hour. The defendant objecting to this mode of tithing, never took the tithes away; and the principal question made at the trial was, whether this were a legal mode of setting out the tithes; that is, whether the tithing ought to have been when the corn was bound in sheaves, and before those sheaves were set up in riders, or whether, in the northern counties, where it was urged that the weather was more catching and uncertain than in the middle and southern parts of the kingdom, the farmer might lawfully put the sheaves into riders immediately, without giving notice of, or waiting for the tithing in that stage of the process, and afterwards draw out the tenth sheaf, in the manner proved in this case, without first taking the rider down altogether. Upon this point the learned Judge was of opinion, that this was not a legal mode of tithing corn at common law, and the plaintiff was nonsuited. The Court of King's Bench refused to set aside the nonsuit, and per Lord Ellenborough, C. J. in giving judgment, "I have no doubt that the mode of setting out the tithe adopted in this case was wrong; corn must be tithed in the first convenient state in which the tithe can be collected after the corn is cut, which is in sheaves; and if the farmer adopt any mode of tithing which excludes or abridges the due means of the parson's comparing the tenth sheaf with the other nine, it is bad. Now, when the sheaves are heaped together in the rider, only part of each sheaf can be seen, and the light is excluded in a certain degree from the greater part of the heap, so as to abridge the means of making the comparison properly. Then, however useful the two covering sheaves may be to protect the rest, and however more convenient that use of them may be to the farmer, what right has he to make such a convenience of the sheaves, one of which he may set out to the parson? There must at the time of tithing be a due separation of the tenth sheaf from the rest, with a due opportunity to the parson of comparing it with the other nine sheaves; but of this he was deprived by the mode of tithing adopted in this case, and therefore it is vicious in its principle." And per Bayley J. "It is said that the practice of shocking the whole is for the convenience and benefit of the tithe owner, especially in the north, where the corn is more exposed to rain. It cannot, however, be decided by any consideration of convenience. In

countries where the inconveniences was very great, it would probably give rise to a custom to warrant the practice; but where there is no legal custom, the mode of tithing must be according to the common law." Smallwood v. Jowle, 13 East, T. R. 261.

Page 72.—The common law mode of tithing corn is in the sheaf and not in the shock. Halliwell v. Trappes, 2 Taunt. 55.

Page 76.—In an action on the stat. 2 and 3 Ed. 6. for not setting out the tithes of barley, the case was this:—The tithes in question arose out of a field of twenty-four acres of barley, three-fourths of which was in the parish of Reedham, of which the plaintiff was rector, and the other fourth was in the adjoining parish of Limpenhaw. On a Tuesday in August the whole crop of barley was cut down, and lay in the swarth; and in the evening of that day, about half of that part of it which was in the plaintiff's parish was rolled and tithed in the customary manner, ready for carrying. Rolling is, where the labourers go along the field and rake the barley transversely from the swarth into cocks or rolls, as far as the rake can reach; and this the Court have held to be a legal mode of tithing. Then the defendant, after rolling and tithing the better half of that which was in Reedham, left off, and proceeded to roll and tithe about an equal proportion of that which was in Limpenhaw, and did not resume the rolling and tithing of the remainder in Reedham till the Thursday; but on the intervening Wednesday, about noon, he carried off his nine parts of that portion which was rolled and tithed in Reedham, before the remaining part of the swarth was rolled and tithed. All the witnesses agreed, that the barley was tithed in the fairest manner. The defendant left off rolling and tithing the rest, and began to carry what was rolled and tithed, because it was doubtful weather. The jury having found a verdict for the defendant, the Court refused to set it aside and grant a new trial. And per Lord Ellenborough, C. J. in the course of the argument upon the motion for a new trial, "If the cutting and saving be done fairly, and in the ordinary course of husbandry, and not fraudulently or capriciously, is there any decision which limits the farmer as to the mode of doing it?" And after the argument was over, "The Jury had the whole of the

evidence submitted to them, and they were satisfied that the tithing was done as fairly as the state of the weather admitted." And per Grose, J. who tried the cause, "I told the Jury that the tithing of the field was not to be done piecemeal unnecessarily, but when begun should be continued fairly, according to the state of the weather: and they found that it was so done." Leathes, clerk, *v.* Levinson. 12 East, T. R. 239.

Page 77, 78.—"The general rule is confined to the close in which the tithes arise. It does not follow that the rector is entitled to go over any other lands of the farmer which are used by him as a road. The parson cannot maintain this point, that whatever road the farmer uses for his own convenience and occupation of his farm, though not the usual road from the close in question, the parson may use also." Per Sir James Mansfield, C. J. in the case of Cobb, clerk, *v.* Selby, 2 Bos. and Pull. N. R. 466; and per Chambre, J. in the same case, "a farmer often uses ways in a variety of directions, leading to the public road. If the parson is entitled to any of them it may occasion great inconvenience. I think that the rule goes no further than this, that the tithe-owner is entitled to make use of the road ordinarily used, for the ordinary occupation of the close in which the tithe is taken."

Page 80.—Upon the trial of an action on the statute 2 and 3 Edward 6. for not setting out the tithes of hay, amongst other things, at the York Spring Assises 1809, before Lawrence J. The evidence as to the hay was, that on the same day on which it was cut the owner tedded it abroad, and on collecting it together again, into what were in that country called lap-cocks, or foot-cocks, he set out every tenth cock. It was admitted that the grass in that state was not fit to put into a stack; it was neither hay nor grass; and when the Defendant's hay was again spread out, there was not room for the Plaintiff to spread out his tithe to dry, without treading on the Defendant's hay: as much space, however, was left for spreading out the tithe as the ground that the tithe had grown upon. Lawrence J. was of opinion that the tithe of the hay was properly set out; and the Court of Common Pleas confirmed his opinion. Halliwell, Clerk, *v.* Trappes, 2 Taunt. 55.

Page 162.—In an action on the statute 2 and 3 Edward 6. c. 13. for not setting out tithes of barley and oats, the question was, whether the land on which the barley and oats grew was exempted from the payment of tithes for seven years under the proviso in section 5 of the act. It was proved at the trial that the land was part of a new inclosure from the common allotted to the Defendant. It was part of the forest, and had whins and brackens growing upon it, and a small portion of ling. Early in the summer of 1811 the Defendant ploughed and limed it, and harrowed it three times, and again in the following spring ploughed it twice and harrowed it six times, and sowed part of it with barley and part with oats. It was a middling crop the first year. There was further evidence as to the nature of the land. The learned Judge who tried the cause, stated to the Jury upon the trial, as the result which he had drawn from the cases, that to render land for which the exemption is claimed tithable within the seven years, it must, at its first conversion and improvement into arable land, be in its own nature so fertile as to produce of itself without tillage a crop which should yield a profit to the occupier *beyond the expense of ploughing, sowing, and reaping:* if it would do that it was liable to tithe for the first seven years, otherwise not. That if the jury (laying out of their calculation the expence of inclosing and clearing the land in question of brackens and whins) thought the land, after being cleared so as to be ploughed was in its own nature so fertile, that if it had been then ploughed and sown it would of itself, without liming, manuring, or tillage, have produced a crop worth more than the expence of ploughing, sowing, and reaping, then in his opinion it was not exempt, and their verdict should be for the Plaintiffs; but if they thought it would not have produced such a crop without liming, manuring, or tillage, then it was exempt, and their verdict ought to be for the Defendant. The Jury found a verdict for the Defendant. The Court of King's Bench being applied to for a new trial on the ground of a misdirection; the Court was of opinion, that neither the words of the statute nor the comment upon it, nor a view of the adjudged cases, would warrant such a rule of law as was contended for; that the proper inquiry was, whether this land was of such a nature as to require extraordinary expences, either in manure or labour, to bring it into a proper state of cultivation;

and the attention of the Jury not having been directed to that point, the Court granted a new trial. Warwick and another v. Collins, 2 Maule and Selw. 349.

Page 182.—To a bill by the impropriate Rector of Fundenhall in Norfolk for tithes, the occupiers by their answer as to part of the lands occupied by them, called Woodland, denied the title of the Plaintiff as such impropriator to tithes, or any satisfaction in lieu of them, alleging that no tithes had been paid for those lands, within the memory of any person, and that the owner of the lands claimed to be, and was entitled to the tithes thereof, and insisting that before the suit could be supported the Plaintiff ought to proceed to establish his title at law to the tithes. As to the other lands, they set up an agreement for a composition. The owner of the lands, called Woodland, stated, that the rectory of Fundenhall came to King Henry 8. upon the dissolution of the nunnery of Flexton, who in 1536 granted it to Richard Stephens and George Buck, and that it had ever since continued in lay hands as a lay fee, and no instance could be shewn of the tithes upon the said lands having been rendered or taken, or any satisfaction for them made to the rector or his lessees, but the same had longer than any living evidence could reach been retained by the occupiers of the said lands for the time being, who had nevertheless usually rendered to the rector, or his lessees, the tithes of the other lands, or made him a satisfaction for the same: he insisted that under such circumstances it must be presumed that he was seised of the said tithes, and that the title to such tithes was a mere question at law, and the Plaintiff ought to proceed to establish his title at law before he was entitled to file any bill in respect thereof. Lord Eldon C. stated the doctrine to be, that when the Defendant has nothing to shew but a mere retainer of the tithes, not an actual grant, or pernancy, or that he has in his title deeds treated the tithes as belonging to him, the mere retainer will not raise a presumption against either a spiritual, or a lay rector, or be a sufficient ground for sending it to law; and he disagreed to the distinction of compounding for part, and not paying for another part, which had been urged as amounting to an actual pernancy; and decreed the account. Berney v. Harvey, 17 Ves. 119.

Page 185.—Amongst other moduses set up as payable at Easter in each year by the inhabitants or occupiers of houses situate in the several townships, &c. of Manchester, having any garden, orchard, or land, at, or belonging to, or used, or enjoyed therewith, one was the sum of 4*d.* by each occupier having any such lands cultivated by the plough by three or more horses, usually called a plough, for and in lieu of all small prædial tithes whatsoever of all such lands so cultivated, and 2*d.* by each occupier having any such land cultivated by the plough by fewer than three horses, usually called half a plough, in lieu of all small prædial tithes of all such land so cultivated. Sir W. Grant, M. R. held this modus bad for want of certainty. Blackburn *v.* Jepson, 17 Ves. 472.

Page 190.—So the annual sum of 1*d.* payable by every occupier of lands, in lieu of tithe of all hay made and carried in and from any of the lands in the tenure of such occupier, be the quantity great or small, as well for two or more farms or tenements, as for one; was upon the authority of Bennett *v.* Read held to be a good modus. Leyson *v.* Parsons, 18 Ves. 173.

Page 199, 200.—In an action upon the statute 2 and 3 Edward 6. for not setting out the tithes of corn, grain, and hay, and clover, and rye grass, and peas, and vetches, the Jury found that there existed throughout the parish (Worthen in Salop and Montgomery) an immemorial custom for the rector to take the eleventh mow or shock of wheat, and the eleventh cock of barley, oats, peas and vetches. The evidence upon the trial was, as to the wheat, the farmer put the sheaves into shocks or mows, consisting of six or nine sheaves; and in case of bad weather, opened the mows or shocks and the sheaves to dry them, and the parson's eleventh mow or shock was set out at the time the whole was ready to carry and not before. As to the barley and oats, it was proved that they were put into cocks, and the eleventh cock set out for the Rector; but nothing further was proved to be done to the barley or oats, except that some of the witnesses said, that if it was wet weather before the parson tithed it, they opened all the cocks and put them up again. As to the vetches and peas, they were first cut into little wads of unequal size, and then put into cocks of equal size, and the parson had the eleventh cock; and

they gave the parson notice to tithe, as soon as they were put into cocks. The Court of King's Bench held this custom good as to the wheat, but not as to the other articles; and per Lord Ellenborough, C. J. "I confess I think in this case that the custom is good as to the wheat, but not as to the other articles. It appears that the wheat, which at common law is tithable in the sheaf, is uniformly advanced to a further stage of labour by being put into shocks, by which it is better protected from the weather; and besides that, if necessity demands it, it is opened for the purpose of ventilation. This benefit, together with the additional labour by the farmer for the benefit of the rector, which the rector must otherwise take upon himself, constitutes a good consideration for rendering the eleventh instead of the tenth shock. I subscribe to the doctrine laid down by Lord Kenyon in Knight *v.* Halsey, that the labour of the farmer added to the quantum of the tithe taken, is considered to be an equivalent for the full tithe. But as to the other articles, there is no evidence of any meritorious labour bestowed upon them, sufficient to support any custom. All that is done to the barley and oats is the putting them into cocks; and the mere additional labour of casually opening them in the event of wet weather, does not seem to me in any degree such a consideration as, in the language of Lord Kenyon, amounts to an equivalent for the deduction claimed. It is too minute; it ought to be a reasonable benefit to the parson. As to the peas and vetches, it does not appear that any thing is done to them beyond what the common law requires. It is clear that they cannot be tithed in the wad, for the wad was proved to be of unequal size, and therefore they are not then in a state in which a just comparison can be made. It is then the duty of the farmer to put them into such a state, which can only be effected by advancing them to an ulterior stage of preparation, i. e. by putting them into cocks, which is the first stage in which they are tithable: and per Le Blanc, J. speaking of the barley, &c. "The parson's share is not distinguishable, nor the whole tithable, until put into cocks, and the farmer cannot bring in aid any occasional ulterior labour which may accidentally be done to the cocks on a wet day by opening them, which the farmer would do for his own benefit, in order to found a consideration for the custom. Until the cocks were actually set out, the farmer could not tell which were the parson's and which were his own, but after the tithe was

set out, it does not appear that he ever opened the parson's cocks. Smith, Clerk *v.* Sambrook, 1 Maule and Selw. 66.

Page 201.—So the sum of 1*d.* for every garden or field sown with turnip seed, and for all turnips growing thereon, without reference to the quantities thereof, was held to be a bad modus, as turnips are an article of too recent introduction into this country to be the subject of immemorial usage. Leyson *v.* Parsons, 18 Ves. 179.

Page 203.—The Court of Exchequer refused to send moduses of 1*s.* 6*d.* and 2*s.* an acre in lieu of the tithe of hay to a jury, considering them as manifestly rank. Wood B. dissentiente. Heaton *v.* Cooke, Wightw. 281. Semble, the Court will not go beyond the decided cases, in some of which moduses of 1*s.* an acre, in lieu of the tithe of hay, have been established. S. C.

Page 210.—A modus of ½*d.* for every garden, for and in lieu and full satisfaction of the tithes of all tithable matters and things yearly arising therein, was objected to as being too extensive, but was held to be good by Sir Wm. Grant, M. R. Blackburn *v.* Jepson, 17 Ves. 473.

Page 216.—In a suit for tithes, it appeared, that an ancient corn-mill had been rebuilt, and two pair of new stones added. Sir W. Grant, M. R. upon the authority of Talbot *v.* May, decreed an account as to the two pair of new stones; observing, that the cases on the subject were not easily to be reconciled. Manby *v.* Taylor, 3 Ves. and Beam. 71.

Page 226.—The late Vicar of Abergavenny made certain compositions with his parishioners for the vicarial tithes which were payable on the 29th of September; and the Easter offerings were payable on the 10th of April in each year; and having received his compositions up to the 29th of September 1802, he died on the 10th of March 1803. In May following the present vicar was presented, and in November following was inducted. The Easter offerings were collected by the sequestrator after April 1803, and were paid over by him to the present vicar; and after Michael-

mas in the same year the present vicar received the vicarial tithes from some of the parishioners, according to the composition of his predecessor, and from others according to new compositions, some more, some less, than the former; in all to the amount of £181 and upwards. The personal representatives of the late vicar brought an action for money had and received against the present vicar, to recover a proportion of such compositions up to the time of the late vicar's death, amounting, as they calculated them, to £68 and upwards. The Defendant disputed this liability to account for the compositions which were not due till his own time, but paid £20 into Court, in order to cover any small sums which might have been due for tithes or dues which, if received in kind, might have accrued between the 29th of September 1802, and the death of his predecessor on the 10th of March 1803, which sum it clearly appeared was more than sufficient to cover any such tithes or dues. And Le Blanc J., before whom the cause was tried at Monmouth, being of opinion that the representatives of the late vicar could have no claim to the Easter offerings due after his death, and that his death put an end to the compositions for the vicarial tithes, at least with respect to his successor, and that the present vicar could not be liable to account for more of the compositions which he had received from the parishioners than the value of the tithes due, if any vicarial tithes for milk, eggs, &c. might have accrued in that interval, between the 29th of September 1802 and the 10th of March 1803, when the late vicar died, would amount to, which were more than covered by the money paid into Court, directed the jury to find for the Defendant, but gave liberty to the Plaintiff's counsel to move to set the verdict aside, and enter a verdict for the Plaintiffs for the whole, or so much of the composition, as the Court should think them entitled to recover. A motion was accordingly made in the Court of King's Bench, where the action was depending, for this purpose; but Lord Ellenborough, C. J. said the composition was at an end by the death of the former vicar, and the present vicar in fact received nothing for him, for no tithes had become due since the last payment in September beyond what the money paid into Court was sufficient to cover; and the Court refused the rule. Williams and others v. Powell, Clerk, 10 East, T. R. 262.

But in a subsequent case, the bill filed by the executrix of the late rector of the parish of Bocking, stated, that he had entered into agreements with the several occupiers of lands within the parish, to receive compositions, payable yearly at Michaelmas, in lieu of tithes; that after his death, on the 6th of May, 1808, the defendant being collated to, and inducted into, the rectory, received from the occupiers the whole of the compositions which became due at Michaelmas, 1808. The bill claiming a reasonable share of such compositions, in proportion to the length of time, during which the late incumbent continued rector, in the year in which such compositions accrued due, prayed an account and payment accordingly. The answer insisted, That the compositions received by the defendant, should be divided between him and the plaintiff, in the following mode:—that the share to be paid to plaintiff, should be to the share retained by the defendant, as the quantity of tithable produce from Michaelmas, 1807, to the death of the late incumbent, was to the quantity of tithable produce from his death to Michaelmas following. Sir Thomas Plumer V. C. said, that the case of Williams v. Powell, upon a fair consideration of it did not appear to him intended to determine the general question; and held that the plaintiff was entitled to an apportionment, with reference to the period of time during which the last incumbent lived; and decreed the defendant to account upon that principle. Aynsley v. Wordsworth, 2 Ves. and Bea. 331. See also anon. Bunbury, 294. Hawkins v. Kelly, 8 Ves. 308.

Page 228.—But where the defendants, in their answer, stated, that they could not be affected by the notice in any way, the Court held this not a sufficiently clear intimation to the plaintiff that they intended to rely on the insufficiency of the notice. Bennett v. Neale, Wightw. 224.

Page 228.—Note (v.) See also Fell, clerk, v. Wilson, 12 East, T. R. 83.

Page 241.—In a later case, in the same parish, Lord Eldon, C. laid down the same principles, saying, that in this case of a claim of this payment for tithes in London, as in the instance of a claim of tithes more strictly, it is not sufficient for the defendant to say

against the claim under the statute, as it would not be sufficient against the claim at common law, that the plaintiffs never had received the 2*s.* 9*d.* : but it is incumbent upon the defendant to shew that he is the occupier of premises, describing them, to which customary payments, which he can specify, can be proved to have attached previously to this statute of 1545 : and the defendants having, in their answer to this case, referred in a rate as containing the ancient accustomed payment within the parish, for or in the nature of tithes, and insisting that they ought to pay for tithes only such ancient sums as in the said rate were charged upon the premises respectively occupied by them, or upon the sites thereof, or the buildings then erected and built thereon; but concluding by stating, that they had no means of ascertaining what particular sums were charged in the said rate on the premises occupied by them, but that the Plaintiffs in answer to a cross bill filed against them by Morris, stated that they had learned and could distinguish, except in a few instances, the particular premises mentioned or referred to in the said rate; the Lord Chancellor held that the Defendants had not so pleaded their exemption as to entitle them to an issue; and although the Plaintiffs had in an answer to a cross bill filed by the Defendants made a discovery of the book containing this rate, and the premises, yet that the answer to that cross bill could not be taken with the original answer, but that the Defendants ought to have moved for leave to file a supplemental answer; and decreed an account at 2*s.* 9*d.* in the pound. The Warden and Minor Canons of St. Paul's *v.* Kettle, and è contra. 2 Ves. and B. 1.

Page 241. The character of a customary payment within the statute Hen. 8. and decree for tithes in London is not, that it must be a payment time out of mind, but if the payment had been usually made during such time as to have acquired in the Ecclesiastical Courts the character of a customary payment, the statute operates upon it. Per Lord Eldon C. in the Warden and Minor Canons of St. Paul's *v.* Kettle.

Page 265. In cases of modus, the rector's title being admitted, he is entitled to demand an issue, but where to a bill for an account of great tithes by the impropriate rector of Sumpting in the county of Essex, the Defendant set up by way of defence a claim

to a portion of tithes under a grant to J. S. in the time of Edward the 6th, of the manor of Sampting, and the tithes both great and small thereto belonging, from whom, by a series of conveyances, he deduced his title: the lands to which he insisted the portion extended, consisted of Whitacre, Blackacre, and Greenacre: At the hearing of the cause the Defendant proved the grant, and constant non-payment of tithes from Greenacre, which was not encountered by any evidence on the part of the Plaintiff: The Court held that the Plaintiff was not entitled to an issue as to the tithes arising from Greenacre, as it was one common law right opposed to another. Barker *v.* Baker, Wightw. 397.

Page 266, note (y), (z), (a).—See these points discussed very much at length in the case of Bennett *v.* Neale, Wightw. 324.

Page 266.—Where the Defendants insisted upon a modus of 1½*d.* for every cow producing a calf within the year, for tithe of calf and milk; and for every cow not producing a calf 1*d.*, for tithe of milk, or if not milked, of the keep and feed, and said that occupiers of land having seven cows, had for some time past, by mistake, been induced to pay higher sums: There was evidence of the payment of the 1½*d.* and 1*d.* where the number of cows was under seven; but for seven or more cows the payment was higher: Sir William Grant, M. R. was of opinion that he could not send to trial a modus, disclaimed by the Defendants, viz. 1½*d.* or 1*d.* for every cow up to seven, and stopping at that number; and decreed an account of tithes of milk and calves. Blackburn *v.* Jepson, 17 Ves. 473.

Page 266.—By the statute 53 Geo. 3. c. 127. § 5. it is enacted, that no action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any Court of Equity, or in any Ecclesiastical Court, to recover the value of any tithes, unless such action shall be brought, or such suit commenced, within six years from the time when such tithes became due.

Page 266.—Where several bills were filed by a rector for an account of tithes, making seven or eight occupiers defendants in,

each suit, a motion was made on the part of several of the Defendants, before answer and without affidavits, for a reference to the Master to examine and certify, whether the several causes, or some and which of them, might not be consolidated. Lord Eldon held the order not of course, but the subject of a special application; and the order was not made. Keighley *v.* Brown, 16 Ves. 244. And the practice seems to be the same in the Court of Exchequer. *Ib.*

Page 270, note (e).—See this doctrine discussed very much at length in the case of Bennett *v.* Neale, Wightw. 224. See also Chatfield *v.* Fryer, 1 Price 253.

Page 282.—It is no objection to the evidence of reputation of a modus, that the deceased person, who told the witness of the reputation in the parish, was himself a parishioner, liable to pay tithe. Harwood *v.* Sims, Wightw. 112.

Page 283.—A bill was filed by the vicar of Monckton with the chapelries of Birchington and Wode annexed, against the occupiers of certain marsh lands, alleging that the vicarage was founded in 1367, and was then endowed with divers kinds of tithes, comprising all kinds of tithes except those of corn and grain; and prayed an account of the tithes of such marsh lands. The Defendants set up a modus, viz. that "from time whereof the memory of man is not to the contrary, there had been paid and payable to the vicar of the said parish a certain ancient modus or customary payment of 1*s.* per acre for each and every acre of marsh land within the said parish for and in lieu of the tithes of hay, and of all and every other vicarial and small tithes arising or renewing upon or in respect of each and every such acre, and which sum had usually been paid at Michaelmas Old Style in each year." The Plaintiff produced the endowment of 1367 at the hearing; and Sir Wm. Grant, M. R. decreed the Defendants to account for the tithes of the marsh lands, being of opinion, that as before the year 1367 there was no vicar, and consequently no vicarial tithes in the parish, the payment stated could not have been immemorially made. Scott *v.* Smith, 1 Ves. and Bea. 142.

But in a later case in the Court of Exchequer in which the vicar of Tirbury filed a bill for an account of tithes, and the Defendant in his answer set up a modus of 3*d*. for every cow, and 1*d*. for every calf, immemorially payable to the vicar of the said parish, in lieu of tithe of cows, calves, and milk; and on the hearing of the cause, the Plaintiff produced his endowment, by which it appeared that the vicarage had been established and endowed within legal memory: The Court said they would aid a Defendant in such a case as this, and direct an issue according to the truth of the case, where the mistake did not, in point of fact, materially affect the substance of the defence. Prevost *v.* Bennett, 1 Price 236.

The Court of Exchequer, in the last mentioned case, referred to the case of Mitchell *v.* Rabbitts, as an authority in point; and to the case of Uhthoff *v.* Lord Huntingfield, 1 Price 237. in not. which was a bill by the rector of the consolidated parishes of Huntingfield and Cookley for tithes.—Answer, a modus or annual payment of 7*s*. from time, &c. payable yearly on Lammas-day, O. S. by the occupiers of the lands called Huntingfield Park, to or for the use of the rector of the said *parishes* for the time being, in lieu and full satisfaction of all and all manner of tithes. Objection, that the parishes having been proved to have been *recently consolidated*, and the rectors, predecessors of the Plaintiff, to have been rectors of *Huntingfield alone*, the modus could not be proved as laid, But the Court directed an issue agreeably to the fact, and allowed it to be framed to meet the inquiry, whether the payment had been immemorially made to the rectors of the parish of Huntingfield.

Page 286, 7, 8, 9, 290.—By the statute 53 Geo. 3. c. 127. § 5. two or more justices of the peace are authorised and required to hear and determine all complaints touching tithes, oblations, and compositions, subtracted or withheld, where the same shall not exceed ten pounds in amount from any one person, in all such cases, and by all such means, and subject to all such provisions and remedies by appeal, or otherwise, as contained in the statute 7 and 8 Will. 3. c. 6. § 1. touching small tithes, oblations, and compositions, not exceeding forty shillings; and one justice shall be competent to receive the original complaint, and to

summon the parties to appear before two or more justices of the peace; and by the same statute 53 Geo. 3. c. 127. § 6. the provisions of the statute 7 and 8 Will. 3. c. 34. § 4., and statute 1 Geo. 1. st. 2. c. 6. § 2. are extended to any value not exceeding fifty pounds, and one justice is made competent to receive the original complaint, and to summon the parties to appear before two or more justices.

THE
LAW OF TITHES.

CHAPTER I.

HISTORICAL INTRODUCTION.

SECT. 1. *Tithes before their legal Establishment.*

WITHIN (*a*) the period which elapsed between the latter end of the fourth century, and the commencement of the reign of Charlemagne, comprehending a space of about four hundred years, the payment of tithes or tenths of the produce of lands, and of other articles, was inculcated as a religious duty by some eminent fathers of the church, and ministers of the gospel; and their preaching was not ineffectual.

But the offerings consequent on these admonitions seem not to have been always in the precise proportion of a tenth, and they were chiefly voluntary, and the effect of conscientious piety, except that where no contributions at all, or such as were illusory only, were rendered, the Church might on some occasions excommunicate, or censure the defaulters. The

(*a*) Seld. on Tithes c. v. § 1. & c. vi. Montesq. Sp. of L. b. xxxi. c. 12.

payments were in a great measure arbitrary also in respect to the persons to whom they were made; being sometimes to the priest officiating at the sacraments; sometimes to the superior of a religious conclave; sometimes to the bishop; and sometimes dedicated to the poor. And it appears moreover, that a perpetual or permanent right to tithes was very early consecrated to some churches by assignment out of particular lands at the owners' pleasure. But the establishment had not yet acquired the sanction of public authority; nor of any ordinance in general force, ecclesiastical, or civil. There are no traces of any law for tithes in the Eastern empire, at any period. And as to the Western church, in the age I am speaking of, the only ordinance (*b*) of undoubted credit for payment of them is that of the council of French bishops assembled at Mascon so early as the year 586. But the decrees of that assembly were never received as general canons, nor did they obtain any great or lasting validity in the district in which they were enacted. Such was the origin of tithes as not yet recognized by secular authority, and thus they existed before the age of Charlemagne.

SECT. 2. *Tithes established on the Continent of Europe.*

TO this powerful monarch, whose dominions were so wide and flourishing, are commonly ascribed the first general laws, certainly the earliest extant, for the payment of tithes. In a general assembly of estates spiritual and temporal held under him in the year 778, about twenty-two years before his title of emperor, it was ordained "*ut unusquisque suam decimam "donet; atque per jussionem episcopi sui dispensetur.*" The indefinite expression, "*suam decimam,*" intimates, that the

(*b*) Gwill. Rep. 488. Seld. c. v. § 5. and Linden 674.

custom of tithing was to a sufficient degree extensive and prevalent to ascertain in some measure the subject matter of the offerings. This law is found among the *leges Longobardorum*, book iii. tit. 3. the whole title being inscribed *de decimis* (c). And it is also admitted in the capitulary of the emperors Charlemagne and Lewis, both of which collections are parts of the *Codex legum antiquarum*, edited by Lindenbrock, where many statutes and ordinances concerning tithes occur. But it appears in point of fact that the establishment met with some opposition, of which the frequency and solemnity of the injunction afford a strong presumption. Thus in one (*d*) of them the duty is said to be confirmed, "*ex utriusque testamenti tabulis.*" Some are interspersed promiscuously among other Mosaical precepts, adopting the expressions of the Pentateuch; and one law inflicts on a person making default, the heavy penalty of forfeiture of his estate in the lands from which the tithes arose, and such estate or interest was at first usually granted for the feudatory's life, and then called (as in the text referred to) *beneficium*. In that passage, as in many other places, of these old institutions, *nonæ et decimæ* are mentioned together. This might lead to a supposition, that in some districts a greater proportion than a tenth was customarily paid; but Selden (*e*) in his profound learning and judgment interprets the *nonæ* to have a signification wholly distinct from the common use of *decimæ*, and to mean the rents or returns reserved on demising lands of the church.

Various authors have adverted to Charlemagne's fourfold distribution of tithes taken, as it seems, from antecedent canons (*f*), and the usage of primitive Christianity, viz. "*ut decimæ* (g) *populi in quatuor partes dividantur: Prima pars*

(c) Linden 674.
(d) *Ib.* 703, 986, 987, 949.
(e) Seld. c. vi. s. 7.
(f) Linden 1101. Seld. c. vi. s. 3.
(g) *Ib.* 674.

episcopis detur ; alia clericis ; tertia pauperibus ; quarta in fabrica ipsius ecclesiæ." Perhaps, however, this rule, after it was so ordained, was not of very extensive prevalence, or duration, or not exactly fulfilled. And indeed the capitulary is scarcely reconcileable in different parts of the compilation. Thus one law directs, "*ut* (*h*) *decimæ in potestate episcopi sint, "qauliter a presbyteris dispensentur;*" whilst another decrees, "*ut* (*i*) *decimæ fideliter sanctæ ecclesiæ reddantur, et pres-* "*byteri secundum canonicam regulam fideliter eas divi-dant;*" this canonical rule is elsewhere(*k*) explained to mean the fourfold division before mentioned, in which latter place the portion of the bishop seems reserved to him in trust to be employed in general purposes of benevolence ; for it is said, "*quidquid exinde pontifex jusseret prudenti consilio est* "*faciendum.*" In this law, and a (*l*) subsequent ordinance of the emperor Lewis, the priests are solemnly admonished to make a faithful partition of tithes received, especially among the poor, and not to sell them, nor treasure them up in barns, a practice of which the prevalence is censured. These several quotations indicate, that the quadruple distribution was never strictly or universally adhered to ; and a peculiar parochial right seems gradually to have centered in the priests respectively officiating in the churches of the districts where the tithes were produced, except as to such proportions of them as had fallen into other hands.

For it is observable how very soon (*m*) after the firm and general establishment of tithes on the continent of Europe, they were in many places perverted from their original destinations, and vested in lay hands by grants and conveyances called infeudations. Such grants were made by princes, bishops, religious houses, lords of seignories, out

(*h*) Linden 854.
(*i*) *Ib.* 944.
(*k*) *Ib.* 1101.
(*l*) Linden 1188.
(*m*) Seld. c. vi. s. 4.

of their demesnes, and, perhaps, by private lay patrons in the vacancies of their churches. But the right of the grantors in making them is not very apparent. The most ancient recorded instance is referred to at so early a period as the year 900, and is a patent from a king of France to the first earl of Holland of the church of Hecmunde, or Egmond, with all things thereto duly belonging. Such alienations were about the year 1060 the subject of complaint to pope Alexander the second, and some time afterwards (*n*) were prohibited by a council of Lateran in terms indiscriminate: Yet they continued so frequent, notwithstanding a like prohibition by another Lateran council in 1139, that about the year 1170 they were made a pretence by some malecontents in the north of Germany for paying no tithes at all, "*præterea* (*o*) *et hi adjecerunt non* "*multùm a veritate aberrantes quòd omnes decimæ in* "*luxus cesserint hominum secularium.*" To remedy so progressive an abuse, a third canon was enacted at a general council of Lateran in 1180 (*p*) prohibiting for the future such infeudations of tithes from one layman to another, which ecclesiastical ordinance seems to have had an extensive reception in Europe. The alienation of tithes not merely to laymen, but even to spiritual corporations, as abbeys and the like, was not obviated till about twenty years afterwards, by a decretal epistle of pope Innocent the third. In the interval between this council, and Innocent's decretal epistle, tithes might (at least with the consent of the diocesan) be arbitrarily consecrated to a religious house, although they could not be alienated to laymen.

(*n*) Selden says in 1078. The Chronicl. ap. Corp. Jur. civ. mentions Concil. Lat. in 1068. & Synod. Lat. in 1072. There were many councils of this appellation.

(*o*) Krantz Wandal. lib. iv. c. 39.

(*p*) So Chronicl. ap. Corp. jur. civ. Linden, 160, & Selden. But Co. 2 Inst. 641. Degge, p. 2. c. 2. & 2 Bl. Com. 27. place it in the year preceding. See Decretal Greg. IX. l. 3. t. 30. c. 19. with the gloss.

SECT. 3.—*Tithes in England.*

IN respect to the payment of tithes in this island, Sir Wm. Blackstone says, (*q*) "possibly they were contemporary "with the planting of Christianity among the Saxons by Au- "gustin the monk, about the end of the sixth century." If the only ground for this surmise is, that the payment was commonly urged, and inculcated from scriptural texts, and as consonant to the divine code, then it may with equal probability be referred to a much earlier period than that monk's mission from Gregory the Great; for Christianity prevailed in general among the Britons, and many ecclesiastical synods were holden here anterior to the Saxon dynasty. It may be remarked, that Augustin (*r*) inquiring of the pope, as to the bishop's portion of the oblations of the faithful at the altar, makes no mention of tithes by name. He receives for answer that the custom is generally to make that quadripartite division before alluded to, which thus appears to be not only more antient than the law of Charlemagne on the subject, but (*s*) conformable also to some very old canon or usage: and this strengthens the hypothesis I have just advanced, concerning the original nature of tithes. In those elder ages, the bishop and his clergy (forming a council or chapter to him) resided together (except such as were sent to minister at a distance), and were in some measure maintained by such pious, indefinite offerings, without any local limits being ascertained, within which tithes were peculiarly demandable.

The (*t*) next mission from Rome after that of Augustin, was in the year 786, when pope Hadrian the first sent

(*q*) 2 Bl. Com. 25.
(*r*) Seld. c. ix. § 2.
(*s*) Seld. c. vi. § 3. cites, Concil. Antioch. Gwill. Rep. 488.
(*t*) Seld. c. viii. § 2.

hither Gregory bishop of Ostia, and Theophylact bishop of Todi, for the reformation and establishment of the ecclesiastical code. Accordingly, distinct councils were assembled of the spiritual and secular powers for the kingdoms of Northumberland and Mercia, the latter of which meetings seems also to have been attended by the states of Wessex, as well as the archbishop of Canterbury, *et cæteris episcopis regionum*. These ecclesiastical legislators readily embraced and adopted whatever was proposed by the authority and sanction of the legates, and among the rest an ordinance *de decimis dandis;* and thus the payment of tithes became the law of the land throughout the whole, or by far the greater part of the dominions of the Saxon heptarchy, not long after this event consolidated into the monarchy of England. In the succeeding ages, frequent mention is made of tithes among the Anglo-Saxon laws: but the first peremptory limitation of them to one church in exclusion of others (except by endowment) is in the laws (*u*) of king Edgar, about the year 970, by which it was ordained that every man not having erected a church of his own, should pay his tithes to the ealdan mynstre, antient minister, (meaning, as the case might be, cathedral, mother church, or monastery), where he heard divine service. The same regard to the more antient places of worship is paid in a constitution (*x*) enacted about forty years afterwards, under Etheldred the second. But it is to be observed, that the ordinances of king Edgar point to the confirmed and (*y*) encreasing practice of thanes and great men, who, as religion prevailed, for the convenience of their families and tenants, erected and endowed churches within their respective seignories and domains; the boundaries of which in future determined the officiating minister's function and his emoluments, and such beneficed incumbent had no longer any claim on the com-

(*u*) Seld. c. viii. § 9. & c. ix. § 4.

(*y*) Seld. c. ix. § 4. Vide 1 P. Wms. 774.

(*x*) *Ib.* c. viii. § 10.

mon stock of tithes, and oblations in the treasury of the diocese. King Edgar's statutes, indeed, confine such endowments of newly erected and consecrated churches, having places of sepulture annexed to them, to one third only of the founder's tithes. But it is with reason supposed that these divisions or districts were soon considered as parishes of themselves, (rites (*z*) of sepulture being an old characteristic of (*a*) a parish church), and in process of time, perhaps speedily, attracted the two reserved thirds, to which the elder or mother church had once a claim. And I should conjecture, that this rarely happened to the prejudice of another *parish* church, in the sense we now use the term (*b*) (for *paræcia* or *parochia* was originally, and for a long time, synonymous with diocese or bishopric); but rather to the diminution of the revenues of some episcopal see, or monastery, which were reciprocally relieved by having fewer officiating clergy to support. The bishop's consent was necessary to the consecration of the new church; he could therefore have no ground for complaint. Many waste and uninhabited spots, not therefore attached to any parish, as they afterwards became cultivated, built upon, and populous, required a resident priest, and were enabled to render him temporal remuneration. Moreover, in places avowedly parochial, it is thought (*c*) that long after king Edgar's time tithes were demanded as due by prescription, or by special consecration of them to the incumbent's benefice, and merely of common right as at present, and as annexed to

(*z*) 1 Vin. Lect. 314. 2 Inst. 363. Gwill. 1000.

(*a*) See 2 R. A. 201.

(*b*) Seld. c. vi. § 3. & c. ix. § 3. Lex. var. Παροικια. Filesacus, in his Paræcia, c. i. calls *parochia* the popular and corrupt, and *paræcia* the true orthography, and says, *canon decimus quartus apostolorum denuntiat episcopo suam descrenti Παροικιαν seu diœcesim, &c.* Decretal Greg. IX. c. iii. t. 30. c. 20. *de parochiâ unius episcopi in diœcesin alterius.* Gwill. Rep. 488. *aliquando parochia pro diœcesi ponitur. Diœcesis interdum pro parochiâ. Rebuffi tract. de decimis quæst.* vi. § 6. See also 5 Co. 67 a.

(*c*) Seld. c. ix. § 3.

the spiritual care of the parishioners resident within the limits. I should therefore ascribe the erection of the greater number of our comparatively more modern parishes to places where no tithes were before payable to any parochial benefice. And these observations collectively may account for the establishment of the incumbent's peculiar and exclusive right to tithes in his parochial limits of recent foundation, without traces found of any controversy in any of the many districts in which these new endowments successively took effect for more than a century downwards from the Norman invasion. Insomuch that, in (*d*) an epistle from king John to pope Innocent the third, it is claimed as (*e*) lawful by the custom of the realm for the bishops, earls, and barons to found churches within their seignories. The right is claimed generally, but the recognition of it, as allowed to laymen, is subject to provisoes, that the bishop's assent be had, and no injustice be done to more antient churches by the new foundations. About this period, however, the practice fell into disuse, probably as the right of the churches already erected became gradually considered as co-extensive by common intendment with the parochial boundaries. For in this age, at least, it was the settled doctrine that all lands were regularly to pay tithes to the mother, or parish church.

But although little or no vestige appear of resistance made to founding parish churches *de novo* in respect to any antecedent right to tithes in the appointed district, yet the religious orders (*f*) were always vigilant to dispossess the secular officiating clergy of their rights, and were probably not a little sedulous in obtaining fresh grants in the interim between the council of Lateran, which prohibited such infeudations to laymen, and pope In-

(*d*) Seld. c. xi. § 3. See 1 P. Wms. 29.

(*e*) 3 Vin. Lect. 33. & n. e.

(*f*) Degge p. 2. c. 2.

nocent's decretal epistle above referred to,(*g*) which(*h*) extended the restraint to spiritual persons also, and conventual bodies, enjoining the due payment of tithes to the parochial incumbents. Sir Wm. Blackstone corrects (*i*) an error of Sir H. Hobart and others, (*k*) who suppose that council to have prohibited such grants to spiritual persons. But are we not to impute the same oversight even to Lyndwood, a learned canonist, and bishop, in the earlier part of the fifteenth century? For he writes (*l*) that after the council of Lateran tithes could not be granted to *any extraneous church or monastery*. However, the error of so many of our common lawyers, before it was remarked by the learned commentator, had been pointed out by Sir E. Coke, (*m*) who also cites the expressions of one of the judges in the seventh year of Edward the third, to the same effect. To this (*n*) decretal epistle, addressed to the archbishop of Canterbury, and received here as law by general consent, may in a great measure be referred the final establishment of the right of the parochial clergy to tithes. They are represented, indeed, in several of our old law

(*g*) Supra, 5.

(*h*) *Cantuarien. archiepiscopo. Ut ecclesiis parochialibus justè decimæ persolvantur. Pervenit ad audientiam nostram quod multi in diœcesi tuâ decimas suas integras, vel duas partes ipsarum non illis ecclesiis, in quarum parochiis habitant, vel ubi prædia habent, et à quibus ecclesiastica percipiunt sacramenta, persolvunt, sed eas aliis pro suâ distribuerunt voluntate. Cum igitur inconveniens esse videatur, et à ratione dissimile, ut ecclesiæ quæ spiritualia seminant, metere non debeant à suis parochianis temporalia, et habere, fraternitati tuæ auctoritate præsentium indulgemus, ut liceat tibi super hoc non obst. contradictione, vel appellatione cujuslibet, seu consuetudine hactenus observatâ, quod canonicum fuerit ordinare, et facere, quod statueris per censuram ecclesiæ firmiter observari. Nulli ergo, &c. confirmationis, &c. Datum Lateran.* 11 *nonas Julii. Innoc.* III. Op. tom. ii. 452. Coloniæ, 1575.

(*i*) 2 B. Com. 27.

(*k*) 2 Inst. 641. Seld. c. vi. § 7. Gwill. Rep. 375, 388, 1556, 1569.

(*l*) Prov. 160. Degge p. 2. c. 2. 2 Vin. Lect. 87. See also Gwill. 187. 210.

(*m*) 2 Inst. 641. and margin. Seld. c. viii. § 23.

(*n*) See Degge p. 2. c. 2.

books (*o*) to be originally and fundamentally due, *jure divino*. But it is foreign to the scope and object of this treatise to consider the validity of that antiquated principle as the basis of a legal right. In point of natural justice, it is clear, that the clergy have a claim to some public provision, and tithes are the species of such provision prescribed by the municipal law; and these foundations are sufficiently solid, on which to rest their title. (*p*)

(*o*) Dy. 43. a. 1 Cro. 161. 3 Bulstr. 243.
(*p*) See Sims *v.* Bennett, Gwill. 887.

CHAPTER II.

Of Tithes, as to whom due, and their legal nature, and properties.

TITHES are by our English lawyers properly ranked among incorporeal hereditaments, because they exist in mental speculation, are subjects of discussion, debate, judicial enquiry, and decision; are capable of being demised, and have other qualities and properties antecedently to, and independently of, the corporeal produce, which they yield. They are, therefore, considered as of that species of legal property, which lies in grant, to convey which a written instrument, or grant specially so called, was always necessary, in contradistinction to corporeal things, as lands which are said to lie in livery, and might anciently have passed by oral gift, and livery of seisin without any written deed.

Tithes are defined by Doctor Wood (*a*) to be "the "tenth part of the increase yearly arising from the profits "of lands, stocks upon the lands, and the industry of the "parishioners, payable for the maintenance of the parish "priest, by every one that hath things tithable, if he cannot "shew a special exemption." In respect to the persons *from* whom tithes are due, the definition imposes the obligation on all having things tithable generally, excepting only those special cases of exemption to be discussed hereafter. It extends to all occupiers of unprivileged land, whether by wrong,

(*a*) Inst. L. Engl. 163. ed. 1763.

as (*b*) trespassers, or by just title. As to the persons *to* whom tithes are due, the definition declares them now at least to be properly and entirely spiritual revenue "for the main-"tenance of the parish priest," without any portion being legally reserved for the bishop, the poor, or the edifice of the church, the repairs of which have with us immemorially devolved on the parishioners at large; those of the chancel only being a burthen on the rector. This, therefore, leads me briefly to enquire who is such parish priest thus legally entitled to tithes.

All tithes within parishes, are due of common right to the rector.

I say "within parishes," for the (*c*) king is entitled to the tithes in places extraparochial, as in parts of forests; and lands are parcel of a parish either by prescription, or by act of parliament.

Edward (*d*) the first granted to the bishop of Llandaff and his successors, the tithes of lands within his forest of Dean, (parts of which are extraparochial), "*de novo assartatis et assartandis.*" The bishop's lessee suing for tithes, as included in the grant under his lease of them, it became necessary to ascertain the legal notion of an assart, which is (*e*) when wood and covert for game are grubbed up, and the ground thus cleared is brought to a state of cultivation. This is a high offence against the forest laws, unless authorized by the formal process of a writ *ad quod damnum*, inquisition, and licence. The court were of opinion in the case before them, that inclosures appertaining to lodges of the

(*b*) Gwill. Rawlins *v.* Wright, 470. but see Wilbraham *v.* Saunders, Gwill. 544.

(*c*) Gibs. cod. t. xxx. c. 3. 1 R. A. 657. Banister *v.* Wright, Styl. 137. Gwill. 501. See Earl of Hertford *v.* Leech, Gwill. 486.

(*d*) Gwill. 1490. Parry *v.* Hervey.

(*e*) 4 Inst. 307. Bunb. 128. Gwill. 645. Evans *v.* Nevill.

king's keepers of his forest removeable at pleasure, did not answer the description of assarts, such inclosures rather [14] being the demesne of his majesty, occupied by himself through his servants. Neither was the description of assarts legally answered by an inclosure, or encroachment wrongfully made by another person not a keeper, and by him put in cultivation, but without the offence of having stubbed up any wood or covert for game, and which simply amounts to a species of what the law denominates (*f*) *purpresture.* It was therefore resolved, that in neither of these instances was the plaintiff entitled to tithes under king Edward's grant as from assarted lands.

This (*g*) royal prerogative in places extraparochial is referable to the principle that the king is *persona mixta,* sustaining both a spiritual, and a temporal character, and therefore capable of a revenue spiritual in its nature. This right, however, being once vested in him, the king may grant it to any patentee at his will and pleasure; or at least might have so granted it before the statute restraining alienations of hereditaments belonging to the crown, 1 Ann. st. 1. c. 7.

On the same ground it is alleged generally, and without confining the proposition to places extraparochial, that the (*h*) king is at common law capable of tithes, and his patentee by his prerogative; and that the king may (*i*) prescribe for them, that is, I apprehend, he must within parishes strictly shew his title by prescription; he is only capable of such prescription; which capability does not belong to his subjects being merely laymen.

(*f*) 2 Inst. 272.

(*g*) 1 R. A. 657. where, as to forests, a farther reason is given from the parliamentary record, 18 E. I. *viz.* that the king may in a forest build towns and churches, assart lands, and endow, and confer such new churches at his pleasure.

(*h*) 2 Co. 44. a.

(*i*) 1 Cro. 599.

In respect to the general right of incumbents, if a rector (*k*) be instituted, and inducted on an illegal presentation, [15] still he may as rector *de facto* though not *de jure*, maintain a suit for tithes. But it may be doubted, since the late statute 44 G. 3. c. 43. hath enacted that no person shall be admitted a priest till he hath attained the age of four and twenty years complete, and if admitted, such admission shall be *merely void*, and such person shall be wholly incapable of having, holding, or enjoying any benefice, (provided no title shall accrue by lapse till after six months' notice to the patron, and saving the right of granting faculties to the archbishops of Canterbury and Armagh,) it may be doubted, I say, whether the (*l*) absolute disqualification thus created might not, previously to any act declaratory of avoidance, or any sentence of deprivation, be set up in defeasance of the claims of such incumbent *de facto*, as much as if the ritual of ordination (*m*) had never been celebrated.

As between the rector ecclesiastical or lay (*n*), and the vicar in the same parish, all tithes to which the vicar (*o*) cannot entitle himself by ostensible endowment, or immemorial usage, and prescription, belong to the rector. But particular questions concerning the respective rights of these parties, will more properly fall under consideration in the next chapter, in treating of the divisions of tithes. (See infra, 51.)

In the mean time it is to be observed, as to incumbents generally, whether spiritual rectors, or vicars entitled to

(*k*) Hob. 302.

(*l*) See Gwill. 536. Stump *v.* Ayliffe. *Ibid.* Pettit *v.* Churley, 1 Cro. 228. Gwill. 1568, Green *v.* Penilden, and conf. Hard. 329.

(*m*) See 1 Vin. Lect. 314. n. l. st. 13 & 14 Car. 2. c. 4. § 13.

(*n*) 2 Bulst. 27. Gwill. 715, 951, 1573, Reynolds *v.* Greene. See Garnon's *v.* Barnard, Gwill. 1462.

(*o*) See 4 Bro. Ca. Parl. 216, 223, 235, 236, Berkeley *v.* Fox.

tithes, that by statute 28 H. 8. c. 11. s. 3. 5. 6. the tithes and other profits of spiritual promotions and benefices growing, rising, or coming, *during the time of vacation,* shall [16] belong to the next successor (*p*) and his executors towards the payment of the first fruits to the king, save that the archbishop and persons in authority under him, are allowed to retain a competent recompence for the service of the cure during the vacation; and *incumbents having manured and sown their glebe,* may dispose of the corn thereof by will; and according to the obvious construction of the statute, their executors or administrators shall have it without any express disposition: and as it is also to be understood, subject to the payment of tithes to the successor, (see infra, 58. 68. 170.): before this statute, it had been held (*q*), that if *parishioners sowed their lands* the first of May, and the parson died, and a new one was instituted and inducted, and then the corn was cut, the executors of the former should have the tithe and not the successor. And still, notwithstanding the statute, the executor of the deceased parson, and not the successor, shall have the tithes of all corn *within the parish severed* from the ground at the time of the parson's death, and not carried away, although the tithes were not then actually set out, for a right to the tithes was vested in the deceased parson by the severance of the corn from the ground (*r*).

But if before harvest an incumbent be *deprived of,* or *relinquish* his benefice, the corn sown on the glebe is said to belong to the successor (*s*), or where there has been no incumbency for several years, (an event not likely to occur) the successor is entitled to the tithes of the whole interval (*t*).

(*p*) See Swinb. 115. Wats. 320. 2 Vern. 136, 204.

(*q*) Bro. A. t. Dismes, pl. 7. cites 21 H. vi. 30.

(*r*) Watts c. 47. fol. 404.

(*s*) Degge p. 2. c. 2.

(*t*) Hard. 322.

A lay impropriator claims tithes by the same common right, and to the same extent as a spiritual rector (*u*). It is (infr 267.) sufficient to allege himself seised of the impropriate rectory, which vests in him the right to tithes without proof of actual payment. There is no difference in this respect between an ecclesiastical and a lay rector, because every impropriator derives his title from an ecclesiastical body.

Farther, a parson (*v*) of one parish may prescribe to [17] have a part of the tithes in another, which is called a portion of tithes. Such portion may have been an arbitrary consecration of them, and not improbably (*w*) more ancient than the foundation of the rectory, or the period of ascertaining the parochial district out of which they are now claimed. Nor is this unlikely to have happened when the domain of a great thane or baron, (as must often have been the case,) extended into what now forms the whole, or parts of distinct parishes. For the payment of tithes as free-will offerings, and even established by law (as hath been stated in the preceding chapter *supra* 8, 9.) probably existed before the partition of the realm into parishes was so general as it is at present.

These (*x*) portions of tithes as well as a complete impropriate rectory may be the property and estate of a mere layman ; but it seems he cannot prescribe for tithes in either of the legal modes of alleging prescriptions, or rights depending on usage time out of mind, that is, as having existed immemorially in himself and his ancestors ; or in him, and those whose estate he hath in hereditaments speci-

(*u*) Bunb. 325. Gwill. 715. Charlton *v.* Charlton, 951. 953. But see post, chap. vii. *sub initio.*

(*v*) Gibs. 663. Degge, p. 2. c. 2. Dean and Chapter of Bristol *v.* Clerke, Dyer 83. Gwill. 123.

(*w*) Sir Edward Coke's case, 2 Rol. Rep. 161. Gwill. 375.

(*x*) Wats. 410. See Hungerford *v.* Hawland, Gwill. 118. in not. and Saunders *v.* Sandford, Gwill. 298.

fied. For where (*y*) in a plea at common law, after stating a custom that the lords of the manor had been used to pay six pounds to the rector in satisfaction of all tithes, a prescription was claimed in the lords of such manor to take *decimam garbam et cumulum granorum*, it was admitted, that a layman cannot have tithes by prescription; but a distinction was taken between a claim of tithes generally, and of the tenth shock, and the like, as the latter may be a temporal profit, and parcel of, or appendant to a manor, [18] which cannot be predicated of tithes, being in their primitive nature spiritual; and as the tenth (*z*), so may the seventh or fifth shock be reserved as a rent from the tenant; and it was the opinion of the Court, that the prescription here was good upon this distinction. But to portions of tithes properly so denominated, the present (*a*) right of laymen is generally considered as derived from the religious houses to which they belonged, and from which they came to the Crown and its grantees. Hence it seems understood, that there are in this country no remaining and subsisting instances of the abuse prohibited in future (*b*) by the council of Lateran, *viz.* grants or infeudations of tithes from laymen to laymen. Although a layman cannot prescribe for tithes, yet, (*c*) from the number of portions in lay hands, it is not now necessary for him in a suit to derive particularly the title from the monastery to which the portion belonged, but he may allege generally, the seisin of himself, or of those under whom he immediately claims. For the omission of stating the title at large cannot influence the merits of the cause, nor prejudice the adverse party in his right to the tithes, (*d*) or to any dis-

(*y*) 1 Cro. 599. 763. Moore, 483. 589. Gibs. t. xxx. c. 3. 2 Co. 45. b. 1 Saund. 142. Wats. c. 47. Gwill. 200. Pigot *v.* Heron.

(*z*) Seld. c. vi. § 6. Sherwood *v.* Winchcombe, Cro. Eliz. 293. Gwil. 164. 211.

(*a*) Gibs. t. xxx. c. 3.

(*b*) Seld. c. vi. § 4.

(*c*) 2 Bro. Ca. Parl. 514. Gwill. 650. Crayhorne *v.* Taylor. ibid. 1120. Lowther *v.* Bolton.

(*d*) See Phillips *v.* Kettle, Hard. 173. Gwill. 513.

charge, or exemption from the payment of them. This matter was finally settled in the reign of George I. by a decision of the lords in parliament, said to be agreeable to former precedents, and to which subsequent determinations have certainly conformed.

In that case it was justly argued, that by the several statutes (*e*) for dissolving religious houses tithes, which [19] have become the property of laymen, have acquired the nature and all the incidents of temporal inheritances. In particular the statute 32 H. 8. c. 7. § 7. enacts, that tithes, or other ecclesiastical or spiritual profits, then or thereafter made temporal, or admitted to be in temporal hands, may be sued for, and recovered in the temporal courts, in like manner as lands and other hereditaments. No remedy is by this law given in the temporal courts against persons neglecting as occupiers of land to set out their tithes; but such cases are expressly referred to the ecclesiastical tribunal. The defendants to be sued by virtue of this statute are those who claim, or hold an adverse seisin, or ownership in, or as parcel of the temporal inheritance. To this purpose, several kinds of real actions are distinctly enumerated; which it seems could (*f*) not be maintained before for tithes, as such, (that is, not appearing to be a lay profit, as of a tenth shock reserved) although brought by spiritual persons, who in that capacity were always qualified to hold this ecclesiastical revenue. A real (*g*) action called an *assize* was sued by authority of this statute not long after the passing of it, when various exceptions were taken; the first of which was, that the writ was of freehold instead of being for a portion of tithes; to this it

(*e*) 27 H. 8. c. 28.
31 H. 8. c. 13.
32 H. 8. c. 7.
37 H. 8. c. 4.
1 & 2 E. 6. c. 14.
1 & 2 P. & M. c. 8. § 38, 39.

(*f*) Year. B. 44 E. 3. 5. 21 H. 7. 36. Gwill. 121. 211.

(*g*) Dy. 83. a. Gwill. 119. 121. Dean and Chapter of Bristol v. Clerke.

was answered, that the old form of the writ was sufficient, and a special subject of demand might be set forth in a subsequent part of the record; and it was also holden, that the allegation in the writ was true, the statute having made tithes freehold, as well as lay inheritances. [20] This species of action is now become obsolete, and the mixed action of ejectment (*h*) which hath superseded it in practice was long since determined to lie for tithes, against the adverse claimant of the temporal inheritance. Farther, as real estates, a husband (*i*) shall be tenant by the courtesy of tithes; and a wife shall have dower of them. Writs of dower are indeed particularly mentioned by the statute: on one (*k*) of which occasions where the countess of Oxford was demandant, it was resolved, that the proper assignment of the dowress's thirds was by allotting to her the third tithe shock and the like, and not the tithes of a third part of the arable land, for then the occupier might forbear to cultivate or sow the assigned spot. Sir Edward Coke (*l*) cites as a maxim "*nullus pro decimis* "*quæ sunt spirituales de aliquâ reparatione pontis seu* "*aliquibus oneribus temporalibus onerari debet.*" But at this day (he adds) if tithes be in the hands of temporal men, they are by reason of them contributory to temporal charges. Still indeed (*m*), spiritual persons and benefices are exempt from charges at common law, though liable to the burthens imposed by statute. Lastly, so completely are tithes in lay hands become temporal property, that the (*n*) right to them is assets in the hands of an heir, or executor, for payment of the deceased owner's debts; only (says Sir E. Coke) they have this ecclesiastical qua-

(*h*) 1 Cro. 301. W. Jon. 321. Degge, P. 2. c. 18.

(*i*) 1 Inst. 159. a.

(*k*) 11 Co. 25. b.

(*l*) 2 Inst. 641.

(*m*) Degge, P. 2. c. 15. where there is a clear and judicious account of first fruits, and other charges due from incumbents, and where it appears that impropriations are subject to the payment of procurations, but that donatives are exempt.

(*n*) 1 Inst. 159. a.

lity remaining, that the proprietor may sue for the subtraction of them in the ecclesiastical court.

But a portion (*o*) of impropriate tithes cannot be [21] parcel of a manor, nor of copyhold tenure, nor demisable by copy of court roll; for which one reason given is, that tithes could not be immemorially demisable, because (*p*) before the council of Lateran no absolute exclusive interest in them belonged to any individual. This reason is scarcely sufficient. The real effect of the decrees of that council has been before shewn, and there can be but little doubt that in many spots tithes were devoted by particular special endowment in permanent exclusive right to parish churches, as well as to monasteries. Another and to me more satisfactory reason, is also assigned, namely, that tithes are of spiritual origin, and of a distinct nature from a manor. And this is correspondent to the ancient principles of our law, according to which all (*q*) ecclesiastical possessions are holden by the free tenure of frankalmoigne. Tithes therefore in the enjoyment of spiritual persons, or of such lay impropriators as have succeeded them in their revenues, and immunities are freehold estates, whatever be the condition of the lands themselves out of which they issue, being a separate and distinct inheritance. Thus it seems the lay impropriator of tithes arising from copyhold lands is entitled as a freeholder to vote at county elections.

In this view tithes are distinguishable from rents, and similar charges issuing out of lands, which follow the nature of their principal, and cannot be freehold, unless the

(*o*) 1 Cro. 293. 814. Gwill. 164. Sherwood *v.* Winchcombe. Sands *v.* Drury, Gwill. 1569.

(*p*) See Sands *v.* Drury, Gwill. 123. n. & Cro. Eliz. 814. Gwill. 375. 388.

(*q*) Bract. lib. c. 28. 1 Black. tract. 115, 116. cited 2 Vin. Lect. 31.

stock from which they spring be also of that tenure. Land (*r*) merely freehold, though holden of a manor, is not parcel of it; and there appears to be less reason, that tithes being freehold should be parcel of a manor. But [22] the entire parsonage (*s*) may be a manor of itself, for if before the statute (*t*) of *quia emptores terrarum* the parson with the patron and ordinary granted parcel of the glebe to divers persons to hold of the parson by divers services, the same would have made the parsonage a manor.

Impropriate (*u*) tithes, like incorporeal hereditaments in general, may be the subjects of grants and other conveyances, and will pass by the name of "hereditaments." And by the before-mentioned statute 32 H. 8. c. 7. § 7. it is specially enacted, that writs of covenant and other writs for fines to be levied, and all other assurances to be had of any parsonage, vicarage, portion, pension, or other profit "called ecclesiastical or spiritual" then made temporal, shall be thereafter devised and granted in the chancery, according as hath been used for fines to be levied, and assurance to be had of lands. Thus distinct portions of tithes, which have immemorially subsisted, as well as a whole impropriate rectory, may be the subject of conveyance like other real property. And if (*v*) Titius have a portion of tithes, and afterwards become owner of the rectory where they arise, the portion is not extinct, but continues grantable, for it may be of greater antiquity than the establishment of the rectorial right in that district.

Sometimes a grant or conveyance of a portion of impropriate tithes will even be presumed, and positive proof, or the production of the grant, will be dispensed with. As

(*r*) 2 R. A. 120.
(*s*) Wats. 362.
(*t*) 2 Vin. Lect. 38. & n. r.
(*u*) Degge, P. 2. c. 18.
(*v*) 2R. l. Rep. 161. Gwill. 375. Sir E. Coke's case.

where (*w*) the same person soon after the Norman conquest was seised of a manor, and of such portion as distinct and separate from the rectory: the portion was granted by Henry VIII. to the dean and chapter of Rochester, the manor and limited estate then being in [23] other hands; but the dean and chapter never had possession under the grant of such portion, never having received tithes from the estate; and although in the several successive conveyances of it there was not express mention of tithes, Lord Kenyon held, that the owner of the estate might, under these circumstances, establish a good title to the tithes also. Who could disturb it? Not the rector, for these tithes have been severed from the rectory almost from the conquest; if indeed they had been part of the rectorial tithes, no time would have barred him; where exists any other title? The dean and chapter before the disabling statute, 13 Elizabeth, might have alienated them; after a possession of two centuries and a half by the successive owners of the estate, a conveyance of these tithes from the dean and chapter is to be presumed. The possession here spoken of was rather a retainer, which must necessarily happen, where the right to tithes and the occupation of the land, whence they arise, are united in the same individual. There results a suspension of actual payment, but no suspension of the abstract right. Thus if (*x*) a parson is seised in fee of and occupies tithable lands within his own parish, such estate during this unity of possession hath with some impropriety been called untithable, because he cannot pay tithes to himself; but if he leases his rectory, then the parson himself shall pay tithes for his other estate to such lessee; and if he aliens his other estate, he shall receive the tithes of it as rector, from his alienee; because the right of tithes cannot be

(*w*) Gwill. 1513. Oxendon *v.* Skinner. See Scott *v.* Airey, Gwill. 1174. & infr. 182.

(*x*) Anon. Dy. 43. a. Gwill. 118.

utterly extinguished by a temporary unity of possession. If he sows (*y*) his glebe, and sells the corn growing, he shall receive tithes from the vendee (infr. 57, 58. 68, 69. 261). If he (*z*) lease his glebe for years, rendering [24] rent "for all exactions and demands" the lessee shall pay tithes for such glebe, for they will not pass to him by these general words. But a grant (*a*) of all a man's right, title, and interest in tithes, will pass a lease of them.

Positive and express alienations of the inheritance in impropriate tithes afford little scope for observations derived peculiarly from the subject of such conveyances. But leases of them, made either by spiritual incumbents or corporations, or by lay impropriators, which transfer only a partial, or temporary interest, require and deserve more particular discussion.

By (*b*) the common law, churchmen after being completely inducted into their benefices, and reputed to be seised in fee in right of them, enjoyed as ample power of leasing as any person seised of a temporal estate in his natural capacity, provided the consent of necessary parties was previously obtained. To *leases* by ecclesiastical corporations aggregate, no consent was essential. But to those made by sole ecclesiastical corporations as bishops, deans, arch-deacons, prebendaries, parsons, and vicars, the consent and affirmation of others were required in order to bind their respective successors. Thus, the demises of parochial incumbents were to be sanctioned by the patron and ordinary, and those of bishops by the chapter. Considerable alteration, however, is introduced by the several enabling and restraining statutes, as they are

(*y*) Degge, P. 2. c. 2.

(*z*) Perkins *v.* Hinde, 1 Cro. 161. Gwill. 119. n. See also 11 Co. 13. b.

(*a*) Cro. Jac. 318. Gwill. 249. Arnold *v.* Bidgood.

(*b*) Wats. c. 41. 1 Inst. 44. a.

called, namely, 32 H. 8. c. 28. 1 El. c. 19. 13 El. c. 10. 14 El. c. 11. & 14. 18 El. c. 11. 43 El. c. 29. and 1 Jac. 1. c. 3. Tithes belonging to spiritual persons, being a frequent subject of such leases, it is material to notice the effect *of these laws*. Their principal result so far as affects the general objects of these enquiries is, that all ec- [25] clesiastical eleemosynary corporations, and all parsons or vicars are restrained from making any leases (other than of houses), except such as shall not exceed twenty-one years, *or* three lives from the making; they must not be for that number both of years and lives, but they may be for a less term or fewer lives; although indeed, till a late statute which I shall presently mention, leases of tithes could be made for years only, and not for a life or lives (which latter are freehold leases), so as to bind the ecclesiastical successor. Another important qualification of leases pursuant to these statutes is, that the antient accustomed rent, or more, must be reserved. The (*c*) last requisite I shall mention as affecting the subject of our enquiries, is that in restraint of concurrent leases. It is, however, to be observed, that the restrictive (*d*) statutes do not empower the making of leases unauthorised by the common law. Therefore, a parson or vicar, although he be restrained from leasing for longer than twenty-one years, even with the consent of the patron or ordinary; yet is not enabled to make a lease of any kind, or for any period, so as to bind his successor without obtaining such consent; for leases of parsons and vicars are expressly excepted out of the enabling statute (*e*) of Henry VIII. and the other acts are of a disabling tendency. It is also to be remarked that, although (*f*) it be provided by

(*c*) See 2 Black. Com. 319. 321. Indeed it has been a doubt whether *tithes could be leased at all* within these statutes, and antecedently to stat. 5 Geo. 3. c. 17. as mentioned hereafter.

(*d*) 2 Black. Com. 321. 1 Inst. 44. b.

(*e*) § 4.

(*f*) 1 Inst. 45. n. & 13 ed. n. 4.

some of the acts, that leases not warranted thereby shall be utterly void and of no effect to all intents, constructions, and purposes; yet such leases are not void, but good against the lessor himself in the case of a sole corporation; or if it be [26] a corporation aggregate, so long as the dean or other head thereof remains, for the statutes were made for the benefit of the successor. Moreover, it seems, that if a lease (*g*) not warranted by the statutes, be made of tithes for years by a bishop, this is not void, but voidable only in respect even of the successor; and if the latter accept rent, it amounts to a confirmation. For it is said (*h*), that before the third council of Nice in the year 710, bishops might by their sole alienation have bound the successor for ever; and although by that council such alienations are restrained as injurious to the church, and the confirmation of the dean and chapter made necessary, yet this is only as to binding the successor. For the fee simple (*i*) is reputed to continue in the bishops, and therefore leases for years made by them subsist after their death, or removal, till avoided by the successor, with the aid of the canons made at that council, which have received a sanction from our law. But parsons and vicars never had such power of alienation; and though (*j*) they have been deemed for the *benefit* of the church and their successors to be seised of a sort of qualified *inheritance*, they have been allowed an estate for *life* only, as to any acts that might prejudice the next incumbents. Therefore, leases for years by parsons and vicars not confirmed by the patron and ordinary, become by the operation of the Statutes just enumerated absolutely void by the death or cession of the lessors, and are not confirmed for the residue of the term against the successor by his acceptance of rent. I say their leases for years, because leases

(*g*) Br. t. Acceptance, pl. 9. t. Lease, pl. 18. Moore 778.

(*h*) Bac. Abr. t. Leases H. where many authorities are cited as to these matters, but not all strictly in point.

(*i*) Pl. 264.

(*j*) 1 Inst. 341. a.

for life or lives *of tithes* made by any ecclesiastical persons, are, on the principles of the common law, without the aid of the statute of 5 Geo. 3. c. 17. which I shall [27] presently mention, valid only against the lessors themselves, *and are absolutely void against the successor*, and incapable of being ratified by his acceptance of rent; and, also, because (*k*) *the leases for life or lives* by parsons or vicars *of things that lie in livery, as of their glebe land*, are avoidable only by reason that such leases being freehold could not be effected without the solemnity of livery of seisin, where any thing (*l*) corporeal was conveyed, and consequently required the entry of the successor to defeat them, who could not so enter after rent received, or any other act done by him in affirmance of the lease. In like manner if a disseisor or other wrongful possessor of lands without the right thereto conveys an estate for life by livery of seisin, a freehold interest actually passes; which is founded on the efficacy of this solemn mode of assurance without regard paid to the imbecillity of the alienor's title. This digression was necessary to explain, why with reference to the above-mentioned statutes I confine the doctrine of leases by parsons and vicars without confirmation by patron and ordinary, being wholly void on the death or amotion of the lessor, and incapable of being substantiated against the successor, to *leases for years only*. It seems, however, that the leases (*m*) of parsons confirmed by patron and ordinary, and otherwise conformable to the statutes, are good, although made by a parson *de facto* only, and who is afterwards lawfully deprived of his benefice.

The acceptance of rent, which is to affirm the voidable lease of a preceding bishop, must be by him, who is perfectly in possession as successor, at least according to one

(*k*) Br. t. Acceptance, pl. 26. t. Lease, pl. 19.

(*l*) See Gwill. 1421. Brewer *v.* Hill, and 2 Anst. 413. S. C.

(*m*) 1 R. A. 476.

case (*n*), in which such acceptance of rent was deemed unavailable, because the successor had not at the time obtained restitution of the temporalities; but it may be ques-
[28] tioned, whether that point would now receive the same adjudication. It appears more equitable (*o*), that the rule should be mutual; that if the lease is voidable both lessor and lessee should be bound by affirmance; or if absolutely void without entry, or other ceremony, both should be discharged. In the latter instance the successor has no remedy under the covenants in the lease, nor for the stipulated rent accrued in his own time; but I apprehend he might maintain an action for use and occupation, or for the mesne profits after a recovery in ejectment.

Besides the restrictions above-mentioned and alluded to, there existed till very lately another mode, by which the leases of beneficed clergymen were rendered void. This happened in case of their non-residence, it being first so enacted by statute 13 El. c. 20. § 7. But that statute with all itslegislative explanations, additions, and alterations, and so much of the act 3 Car. 1. c. 4. as make the first act perpetual, are by statute 43 G. 3. c. 84. § 10. now repealed. The residence of the beneficed clergy is enforced so far as was judged proper by new regulations, without substituting any new provisions by reason of absence from their cures in restraint of the validity of their leases; on the contrary, this to a certain extent may be ranked as an enabling statute. For the statute 21 H. 8. c. 13. prohibiting spiritual persons from taking farms, is in some measure abridged in its operation, by the recent statute, by which it is enacted, that it shall be lawful for any person having or holding any vicarage or perpetual curacy, or for the stipendiary curate thereof respectively, to occupy by himself or any other to his use in farm of the lease or grant of any

(*n*) Palm. 175 (*o*) Poph. 121.

person or persons, the impropriate parsonage, rectory, or vicarage respectively, of the parish of which such spiritual person shall be the vicar or perpetual curate or stipendiary curate, or any part or parts thereof respectively, or [29] to take any profit or rent out of any such farm without being subject to any pains, penalties, or forfeitures under the recited act of Henry VIII. The taking, thus authorized, it is to be remarked, is confined to the parish where the lessee officiates, sanctioning a lease of premises within its boundaries only. But independently of such local limitation some doubt may be entertained as to tithes, whether they are restrained from being leased to spiritual persons by the law of Henry VIII. under the words "tenements or "hereditaments."

I have before intimated that freehold leases of tithes were heretofore void in favour of the successor. Thus, where a bishop (*q*) being seised in fee of tithes in right of his bishopric, made a lease thereof for three livees, rendering the ancient rent at which they had usually been demised; the lessor died, and the question was, whether the lease was binding upon the successor: it was resolved, that it did not bind him; for he had no remedy for the rent, either by distress, or by action of debt, because it could not be called rent; but it would have been otherwise if it had been a lease for years, for in such case an action of debt may be maintained. Annual payments (*r*) reserved out of incorporeal hereditaments, were not by our old lawyers allowed to be properly *rents, for this reason, that they were not recoverable by distress, the terms being convertible.* Such payments could not be distrained for, because incorporeal hereditaments, as creatures of the imagination, have no locality; and by the ancient statute

(*p*) Moore 778. (*q*) 2 Vin. Lect. 67, & seq.

of Marlbridge 52 H. 3. c. 15. (which is said (*s*) to be but an affirmance of the common law), distresses must be locally made. Consequently, if a yearly payment had been [30] reserved on the demise of tithes, and something corporeal, as a barn, jointly, the same was considered as a rent issuing (*t*) wholly out of the barn in respect to the remedy by distress. Neither could the successor maintain an action of debt on a freehold demise of tithes during (*u*) the continuance of the estate for life or lives; because that is a personal action, and to recover rents so reserved would be to recover seisin, which species of judgment is descriptive of a real action. Hence it is that (*v*) even acceptance of rent by the succeeding bishop, would not have availed to substantiate a freehold demise of tithes, because if the rent afterwards became in arrear, he was without remedy under the lease being precluded from the easy and obvious resources of distress and action of debt, and also from bringing a species of real action, called an assize (*w*) of rent, for such payments out of things incorporeal are no legal rents. Now, however, by the statute above alluded to, 5 G. 3. c. 17. the same power of bringing actions of debt, which by a former law, 8 Ann. c. 14. § 4. had been indulged *to lessors against tenants for life as to proper rents, is extended* to sole and aggregate ecclesiastical corporations, heads and fellows of colleges, and others having power of leasing, *to* recover *rent reserved on tithes and incorporeal hereditaments, although leased for life or lives.* The statute of George III. recites, that it may be doubtful whether by the laws in being such lessors as aforesaid could grant leases of *tithes* or other incorporeal hereditaments, which lie in grant, and not in livery, for *three lives,* or for twenty-one years, although the ancient rent or yearly sum

(*r*) 2 Inst. 131.
(*s*) Gwill. 359.
(*t*) St. 8 Ann. c. 14. § 4.
(*u*) 2 Cro. 173.
(*v*) 8 Co. 46. a.

is thereby reserved, and all other requisites prescribed by the acts of parliament are justly observed, *by reason that there is* generally *no place wherein to distrain for such rent* or yearly sum; and that it may also be doubtful, [31] whether in cases of *such leases for life or lives,* there was any remedy by action of debt or otherwise; but it is not represented as in any degree questionable, whether the lessors and their successors might have that personal suit on a demise for *years:* and the other doubts recited may perhaps be thought resolved by the foregoing discussion, except as to the power of such ecclesiastical and other persons to grant leases *for years* of tithes (*x*) and other incorporeal hereditaments, because, although here the remedy by action of debt might be had, yet the other remedy by distress failing (*y*), and so the payment reserved not being properly a *rent,* the ancient rent could not be said to be reserved, which is one of the requisites prescribed by the acts of parliament. After these recitals, the new statute proceeds to give validity to all such leases of tithes and incorporeal hereditaments (with a saving, however, of the restrictions imposed by the founders on colleges, and of the like local regulations), and allows the action of debt to be maintainable by the lessors themselves, their personal representatives, *or their successors for the rent* due on such leases, whether made for life or for years. But the act of parliament names divers corporations sole, and aggregate, and then adds, "any other person or persons having any spiritual or ecclesiastical promotions," without any mention *of lay impropriators,* and therefore a question has been raised (*z*) of what remedy at common law such lay impropriator could avail himself to recover the yearly payments reserved on a lease granted by him of his tithes for life or lives if he should so demise them; but perhaps that law now giving

(*w*) See 1 Inst. 44. b. & 13 ed. n. 3.

(*x*) Supr. 29.

(*y*) 2 Vin. Lect. 70.

such payments the denomination of rents, they might fall within the provisions of the statute of Ann above-mentioned; if not, there is this defect which still remains to be supplied.

[32] By the statute of frauds 29 Car. 2. c. 3. all greater interests in lands and hereditaments than for a term of three years, must be created by some writing (*a*). At common law (*b*), and independently of the statute, it seems no regular *lease*, even for one year of tithes (as incorporeal hereditaments), could have been made by parol. But (*c*) if a tithe owner agree with another to permit him to take the tithes of corn and hay for six years, and permit him accordingly, this is a good consideration (though not valid as a lease, and though no legal interest passes in the tithes) to found an action to recover the payment stipulated for in return.

Freehold leases of tithes are regulated by the same common law principles as the like *quantum* of interest or estate in corporeal hereditaments, whether the demise is made by a spiritual rector seised in right of his church or by a lay impropriator seised of a rectory, or a portion of tithes being a temporal inheritance, as appears by the following case (*d*): *Rabbit* being seised of land to him and his wife and to his heirs, took a lease from *Booth*, parson of *B.* of all his tithes of this land, by indenture, to hold *from Michaelmas next* to him and his heirs during the life of *Booth*. The lessee died, and his widow having the land for her jointure, married *Fowler*, who demised it to *Edmonds*; and the heir of *Rabbit* being entitled to the tithes under the lease to his ancestor (*Fowler* and his wife having no claim to them)

(*z*) Williams *v.* Cullum, Gwill. 744.

(*b*) 1 Freem. 234. anon. See the cases cited Gwill. 1217, 8.

(*c*) Skin. 113. 2 Show. 307. Eaton *v.* Sherwin. See also Keddington *v.* Adamson, Gwill. 611. & infr. 225.

(*d*) Yel. v. 131. Gwill. 228. Edmonds *v.* Booth.

demised them also to the same tenant, who thus held the land and the tithes by distinct titles from several persons. Under these circumstances *Booth* sued *Edmonds* in [33] the spiritual court for tithes of the land in derogation of the lease granted by himself; and on an application to the court of King's Bench to stay such suit, it was allowed to proceed by the opinion of the majority of the judges, (then being five,) on the ground that the lease to *Rabbit* was absolutely null, because generally by the common law no freehold interest can be granted commencing *in futuro*, as here, from the ensuing Michaelmas. I have thus recited the case not so much to evince this point as to elucidate another, which could not otherwise be explained, and seems to merit some attention. It was insisted, in support of the lease, that it was made only of the tithes of that land of which *Rabbit* was then the owner, so that it did not enure by way of interest, but by way of discharge and retainer; for a man cannot have tithes of his own land; and then a *discharge* may well commence at a day to come. But to this it was answered, that the pleadings allege that by force of the lease in question, *Rabbit* was seised of the tithes to him and his heirs during the life of *Booth;* and being so pleaded by way of interest they, as Judges, could not intend or construe it otherwise. Such lease cannot enure by way of discharge, for it contains no words to that effect, which proves it was not intended by the parties to operate but by way of interest; and that is more beneficial to the lessee: for, if it should enure by way of discharge only, it is such a privilege annexed to the land as cannot be granted over; but it may, if by way of interest; and so it seems understood by the persons concerned, for the wife was owner of the land, but the son took upon himself to be owner of the tithes, which could not be if the first lease had enured by way of

discharge. Such a contract (*e*), however, in the nature of a demise may enure (with apt words for that purpose) by way of discharge from tithes, being effected by deed, [34] and entered into for a reciprocal valuable consideration, as an annual payment; and it may be good during the incumbency, and be explicity extended to the farmers and tenants of a landlord so contracting.

Again, a demise (*f*) of tithes during such time as the lessor shall continue rector or vicar, passes to the lessee a freehold, such being the estimation of uncertain interests in all species of real property, which may possibly endure for any life or lives; and with respect to incorporeal hereditaments as tithes are, and lie in grant, the mere tradition of the deed has the same force as livery of seisin in the case of land; but if a rectorial or vicarage house, (which are corporeal hereditaments, and lie in livery) are demised with the tithes, and the latter only pass as parcel of the rectory or vicarage, the intended freehold demise is ineffectual for the whole, as conveyances at common law, without livery of seisin.

A lay impropriator in fee may lease his whole rectory or a parcel of it, as the tithes of a particular farm for any number of years without restraint; and if he demises such parcel (*g*), and subsequently to that lease makes a grant of the rectory generally, the grantee will be entitled to the tithes of that farm, after the lessee's term is expired, though if the lease is made (as commonly) to the occupier of the land, there is, during its continuance, a suspension of actual payment of these tithes, for they exist in

(*e*) 2 Cro. 137.

(*f*) Gwill. 1421, 2. Brewer *v.* Hill, from 2 Anstr. 413. See Wheeler *v.* Hayden, Cro. Jac. 328.

Gwill. 258.

(*g*) Gwill. 358-9. Dickinson *v.* Reade.

speculation as parcel of the rectory; and the reversion in them subject to the term passes to the grantee.

As a lay impropriator in fee has the uncontrolled disposal of this species of real property in his life-time, so, doubtless, he may by his will legally executed, devise a partial or absolute interest in it; and if a man (*h*) [35] devises all his lands in A. having no real property, except a portion of tithes there, the portion will pass to the devisee notwithstanding the incompetence of the description, that the will may not be wholly inoperative.

Having thus far treated of the legal nature and properties of tithes, and of the several rights by which they may become due and be received, it remains only to speak of sequestrations, which are within the scope of the present chapter, both as descriptive of the quality of tithes, and as shewing who may have a temporary right to demand them (*i*). Sequestrations are in use on various occasions: First, it being incidental to tithes and other spiritual possessions, to be exempted from the sheriff's power of levying thereout any judgment debt, (which Sir Edward Coke (*j*) enumerates among the privileges preserved to the church by *Magna Charta*), on (*k*) such sheriff's return to a writ of execution directed to him, that the defendant is a beneficed clergyman, having no lay fee, a writ called a *levari facias* issues, requiring the diocesan to levy the demand out of his ecclesiastical goods, and by virtue thereof, his tithes shall be sequestered. Such process, indeed, has been (*l*) contended not to be a

(*h*) Swinb. 140. 9 Mod. 74. 3 Wms. 386.

(*i*) See Sheffield *v.* Serjeant, Hard. 102. Gwill. 503. & infr: 264.

(*j*) 2 Inst. 4.

(*k*) Burn. Eccl. L. t. Sequestration, F. N. B. 599. 1 Sel. 320.

(*l*) 1 Mod. 260. 2 Mod. 257.

proper sequestration, because the return of the bishop is to be (as of a sort of ecclesiastical sheriff) *fieri feci*, or *nulla bona*, and not *sequestrari feci*; but the distinction rests in mere matter of form.

Another (*m*) occasion of sequestration occurs, where the right to a benefice is in controversy, and a suit is depending to try which of two claimants is the lawful incum- [36] bent of a parsonage, or vicarage; or after sentence against one party, who has appealed to a higher jurisdiction.

The general course of proceeding seems to be this; —On a proper petition in the case last put, by either of the litigants, alleging the controversy, and that opposition is made to collecting the profits, the ecclesiastical judge decrees, that the fruits of the church be sequestered, and commits the power of collecting them to the churchwardens, or some others of the same parish, who thus acquire a temporary right of receiving the tithes; which, Dr. Burn says, it is best, and most legal for the sequestrators to receive in kind. But the judge previously takes a bond from the persons to whom this authority is deputed, with a condition underwritten, duly to collect the profits, and to render a just account thereof; and where the right to the incumbency is in dispute, he usually appoints some minister to serve the cure for the time that such controversy shall be depending, and requires the sequestrators to allow an appointed salary out of the profits of the church to such officiating curate; and he also orders them to cause the sequestration to be published in the church in the time of divine service, that the parishioners (*n*) may know to whom tithes are to be paid. After the sequestration hath answered its purpose, and is taken off (as when a judg-

(*m*) Wats. c. xxx. (*n*) God. Rep. can. app. 15.

ment debt is raised and satisfied; or when the litigation respecting the right of the benefice is determined), the clear residue of the profits collected is to be restored to the party entitled to them in specie, if they remain so; or if not, their value is to be paid to him. This the sequestrators, if indisposed of their own accord, are compellable to do by the spiritual court; and if being summoned there, they delay coming to a just account, the judge may deliver the aforesaid bond to the party aggrieved, in order to his suing upon it at the common law.

A third case for sequestration is, as a remedy for [37] (*o*) dilapidations. Thus, when the rectorial house or chancel, which the incumbent (*p*) is bound to repair, is in a decayed and ruined state, if after due admonition he shall delay to begin repairing the same for the space of two months, then the bishop shall sequester the tithes and profits of the benefice till the necessary repairs shall be accomplished. The admonition may proceed from the archdeacon; but the diocesan only has the power of sequestration. The whole (*q*), however, ought not to be sequestered for dilapidations, but a competent allowance left for the incumbent's maintenance.

Lay impropriators are generally under the same obligation of repairing the chancel, as spiritual rectors; but (*r*) impropriate tithes cannot be on this account sequestered. This, at least (*s*), seems admitted to be the prevailing opinion among the common lawyers. For although bishop Gibson alleges reasons against it, particularly, that nothing

(*o*) God. Rep. 14.

(*p*) A vicar may be bound to repair the chancel, or to contribute thereto, Lynd. 253.

(*q*) 2 Vent. 35.

(*r*) 1 Mod. 258. 2 Mod. 254. 2 Vent. 35. 3 Keb. 829. cont.

(*s*) Ayl. Par. j. can. 495. Gibs. Cod. 199.

was conveyed to the king at the dissolution of the monasteries, but what those bodies had enjoyed, that is, the profits over and above the finding of divine service, the repairing of the chancel, and other ecclesiastical burthens: Yet the legislature having made such impropriations lay fees, they of course become exempt from the jurisdiction of the spiritual court, and this seems conclusive on the argument. But, for (*t*) neglecting the repairs of the chancel, lay impropriators are personally amenable to the ecclesiastical tribunal, and may be proceeded against by citation, censures, and excommunication. Dr. Burn (*u*) re- [38] commends the course proper to be pursued, and seems to think it necessary for churchwardens who sue, to prove that the parties prosecuted, (for there may be more than one impropriator), have received tithes or other profits belonging to the rectory, sufficient to answer the repairs; and adds, they must settle the proportion among themselves.

On this occasion, at least, however, it is requisite to distinguish between appropriations and impropriations, though often mentioned indiscriminately. The latter, as may have been collected from what has been before stated, are such parsonages as having belonged to the religious houses by the statutes for dissolving those bodies, came to the king, and from him to his patentees, and are now vested in lay hands. The same account may be given, I apprehend, of most, but not (*v*) all *portions* of impropriate tithes, at present in lay hands. An appropriation (*w*) is where such a parsonage or other church preferment belongs to, and is in the possession of some ecclesiastical

(*t*) Ayl. ibid. 3 Keb. 829.
(*u*) 1 Burn, 322.
(*v*) Gwill. 1513.
(*w*) 4 Burn, 10. See Grendon v. Bishop of Lincoln. Plowd. 493. Gwill. 136. & infr. 51. See also Priddle v. Napier. 11 Co. 8. b. Gwill. 236. and Macgill v. Le Strange, Gwill. 815.

corporation, sole or aggregate, and their successors, of which there (*x*) are alleged to be in England above a thousand. And as to such of them, at least, as never were the property of the religious houses, and, therefore, certainly were not made temporal fees by the statutes of dissolution, there appears no ground (*y*) to exempt them from the power of sequestration for neglecting the repairs of the chancel, more especially, as corporations aggregate (the more frequent owners of them) are not capable of being excommunicated. And it seems clear, that (*z*) where a prebendary possesses tithes, or other spiritual revenue, as annexed to his peculiar stall, or in his sole and distinct right, a sequestration may issue for dilapidations. But where he is only entitled as a member of the [39] body aggregate, the estate of the corporation cannot be sequestered for the default or debt of the individual.

Another (*a*) common occasion of sequestration is the avoidance of a benefice. During the vacancy, the churchwardens are to receive the tithes and profits by the bishop's appointment, under the seal of his court, to provide for the cure, and to render an account to the successor. The ordinary (*b*) has this power, though the right of presentation be in the king, if he omit the exercise of it, that there may not be an interruption of divine service.

Lastly, the (*c*) tithes and profits of a benefice may be sequestered, where the incumbent neglects the cure ; and such was (*d*) the implied mode by which the ordinary was to collect, in order to distribute among the poor of the parish, one year's profits of the benefice of an incum-

(*x*) 2 Mod. 257.
(*y*) 2 Mod. 254.
(*z*) 1 Sel. 321.
(*a*) Ayl. ibid. God. ibid.
(*b*) Doct. and Stud. dial. ii. c. 36. Wats. 72. 2 Mod. 255.
(*c*) God. ibid. 15.
(*d*) Wat. c. xliii.

bent, not residing, forfeited by statute 13 El. c. 20. while that law was in force. It is, therefore, consistent with ancient and systematic usage on this occasion, that the recent statute 43 G. 3. c. 84. which repeals the former act, directs its regulations to be partly enforced by sequestration as to such non-residence of beneficed clergymen, as is not authorized by licence, or exemption under the new law. First, it is thereby properly and justly provided, and in (*e*) conformity to the principles of our old law, that (*f*) no penalties or costs incurred by non-residence and judgment shall be levied by taking in execution the body of the party sued, where it shall appear that the demand may be raised out of his preferment by sequestration within the term of three years; secondly, in (*g*) case of the dio- [40] cesan's monition to a spiritual person to reside, and perform the duties of his cure, and no return made thereto, or one that is unsatisfactory, it shall be lawful for such diocesan to issue an order in writing enjoining residence, and if that be not complied with, to sequester the profits, with a power, however, given to a party thinking himself aggrieved, of appealing to the archbishop of the province. Lastly, if (*h*) a clergyman shall continue three years under sequestration for non-residence, or shall within that space incur three sequestrations, not being relieved as to any of them on appeal, his benefice shall become *ipso facto* void, and the patron may present thereto some clerk other than the party sequestered, as if vacant by natural death, or resignation (*i*).

(*e*) F. N. B. 305.

(*f*) § 17.

(*g*) § 30.

(*h*) § 33.

(*i*) On the subject of non-residence see Collins *v.* Vaughan, Cro. Eliz. 109. Gwill. 161. Goodale *v* Bicker, Cro. Eliz. 590. Gwill. 204. Canning *v.* Jones, Gwill. 364. Mills *v.* Etheridge, Gwill. 660. Quilter *v.* Mussendine, Gilb. Eq. Rep. 228. Gwill. 668. Law *v.* Ibbetson, 5 Burr. 2722. Gwill. 1002. Wilkinson qui tam *v.* Allot, Cowp. 429. Gwill. 1098. Atkinson *v.* Folkes, 1 Anstr. 67. Gwill. 1376.

Sequestration is only a temporal suspension of the incumbent's perception of the profits. It is said (*j*) not to bind the interest, nor put the rector out of possession. Certainly institution and induction *de novo*, after sequestration is taken off, are not necessary to reinstate him in his right to tithes. And (*k*) if the continuing incumbent, or successor, as the case may be, is dissatisfied with what the sequestrators have done in the execution of their charge, the more proper tribunal in which to call them to account, and for the redress, seems to be the spiritual court; and if he still considers himself aggrieved, he may carry on the cause by appeal through the ascending series of ecclesiastical jurisdictions.

(*j*) 1 Mod. 259. (*k*) 4 Burn, 318.

CHAPTER III.

Divisions of Tithes; and Matters between Rector and Vicar.

TITHES have been variously divided and classed.

I. (*a*) The most approved and unexceptionable division of tithes, generically, seems that which distributes them into three classes, of predial, mixt, and personal. This distribution is alluded to by the definition of tithes given in the last chapter. Predial tithes, or tithes of (*b*) *quidquid oritur ex prædiis*, are derived immediately from the ground, as corn, and hay, and other fruits of the earth. Mixt tithes are produced mediately through animals, which have their sustenance and nourishment from the ground. Personal tithes arise from the labour and industry of man.

The first material distinction flowing from this division is made by the statute 2 and 3 E. 6. c. 13. which requires all the king's subjects truly and justly, without fraud or guile, to set out and pay their predial tithes (*eo nomine*) in their proper kind, in such manner as hath been of right yielded within forty years next before the making of that act, or of right ought to have been paid. The necessity (*c*) of setting out tithes, is applicable to predial tithes only.

(*a*) Doct. & Stud. dial. ii. c. 55. § 313.—Degge, p. ii. c. 1.—Gwill. 356. 29. 429, 430. 1447.—Scarr *v.* Trin. Coll. Camb. from Anstr. 760.

(*b*) Rebuffus cited, Gwill. 429.

(*c*) Gwill. 428. Norton *v.* Clarke.

Mixt tithes are said to arise from the earth also, but by means of animals depastured on it, or otherwise nourished with its fruits. In this class, therefore, are (*d*) enumerated, not only the live increase, or young broods of cattle and poultry, but other profits resulting through the medium of animals so nurtured, as wool, milk, cheese, and eggs.

In (*e*) a recent case, the principal question was, whether agistment tithe (that is tithe of pasturage, or more properly (*f*) tithe in respect to herbage, or grass eaten by cattle not tithable), was a predial or mixed tithe. To shew it to be the former, it was argued, that it was paid not for the increase or improvement of the animal agisted, but for the grass eaten by it, and was proportioned to the value of the grass, not to the value of the actual improvement; that when the occupier of land does not agist his own cattle, but those of strangers, the tithe for the agistment of barren cattle is due from the occupier as owner of the grass, and that if the grass has before paid tithe of hay, no tithe is due for the agistment of the aftermath; hence it was inferred, that the tithe was attached to the grass, not to the cattle. On the other hand, the aforesaid statute of Edward the Sixth was relied on as establishing, that all predial tithes were such as might be set out, agistment tithe is incapable of being so: and it was among other things contended, that animals reared for the plough, *or pail do not pay tithe when young; yet, if the tenant changes his mind and sells them, agistment tithe becomes due from the first;* but if it were tithe for the grass it would have been due immediately, and would not have depended on a future event. But the court held, that the arguments used on the part of the farmers, satis-

(*d*) Wats. c. xlix.

(*e*) 3 Anstr. 760.—Gwill. 1445. Scarr. *v.* Trin. Coll. Camb. & Wood.

(*f*) Gwill. 1335. in Ellis *v.* Saul, from 1 Anstr. 332. Gwill. 1547.

factorily proved, that agistment tithe is the tithe of the grass eaten, which arises immediately from the soil, and, therefore, it is a predial tithe; and as to the statute, which affixes a penalty on not setting out predial tithes, it must be understood, as relating to those only, which are capable of being set out.

Predial and mixt tithes are to be paid according to the value of the articles tithable, without (*g*) deducting for labour and expences: but as to the third class, personal tithes arising from the personal labour of the parishioners, the tenth (*h*) of the clear gains only is due.

These personal tithes are supposed to have become less considerable than they were formerly. For they are thus described by Lindwood (*i*) "*sic dictæ quia potius respectu personæ solvuntur quam rei utputa de artificio negotiatione & militia :*" and Watson (*k*) speaks of them as payable by men of numerous occupations and descriptions, viz. buying, selling, merchandizing, fishing, fowling, hunting, or following any trade. Their sinking into disuse, is attributed by Dr. Wood (*l*) to the clause in the statute 2 & 3 E. 6. c. 13. which does not allow the ordinary to examine a parishioner on oath as to these personal tithes. By the same statute, § 7. day-labourers are exempted from this payment. It has also been determined (*m*), that an innkeeper is not chargeable with them in respect of the profit made by the sale of wine and beer, nor any person for the gain of money put out at interest. It would, therefore, perhaps be difficult to find any species (except the two articles hereafter mentioned) of personal tithes, payable at this day; the statute (*n*) confining the payment to such

(*g*) Gwill. 430.
(*h*) St. 2 & 3. E.
(*i*) Prov. 195.
(*k*) c. xlix. and li.
(*l*) Inst. 176.
(*m*) 2 Bul. 141.
(*n*) § 7.

persons and places, by whom, and in which the same have been *accustomably* used, or ought to have been made within *these* forty years, that is, next before passing the act; adverting, as it seems, to the rule of the ecclesiastical courts, according (*o*) to which that space of time will establish a custom, or prescription. It is (*p*) not sufficient that they have sometimes, but must have been constantly paid within the forty years next before the act. If it be demanded how such payment is to be proved? Degge answers, by what has been done all the time of memory *since* the act. Here, then, another important difference is made by the statute between these personal tithes and the two other classes, the former (*q*) not being like predial, or mixt tithes due of common right, but where they have not usually been paid, not being of right demandable.

The two distinct articles above alluded to, as perhaps the only species of personal tithes now payable, which have been judicially referred to this class, are those of mills, and fish.

1. And indeed in respect to mills, strictly speaking, tithe of mills is not simply a personal tithe, though to be paid for as such; it partakes of a predial nature *quia de locis certis percipitur* (*s*). Mills more ancient than the ninth year of Edward the Second are (*t*) by a statute then passed, called *articuli cleri*, c. 5. impliedly discharged of tithes. If such mill be rebuilt upon the old foundation, exemption shall hold good, and revive. But (*u*) if the materials of

(*o*) 1 Wms. 663.

(*p*) Degge, p. ii. c. 22.

(*q*) 3 Bul. 212. 1 Rol. 405. Burn, 73.

(*r*) Vid. infra, 48.

(*s*) Gwill. 130. n. 982. Ansell *v.* Adman; but the St. art. sup chartas, is put by mistake for art. cleri.

(*t*) Gwill. 871. Thomas *v.* Price, 286. anon. But see Gwill. 355. More *v.* Russel, that a scite discharged by a modus exempts a mill erected thereon.

an old mill are employed in erecting a new one on a different scite, though on the same stream; or if such new mill is built on land exempt from tithe, as having belonged [45] to a religious house, personal tithes are due, that is, the miller must account for and pay to the incumbent where the mill stands, the tenth part of the profits arising from corn, grain, and malt ground over and above all incidental charges; among which rent (*v*) is a principal deduction where the mill is occupied by a lessee; where, by the owner, the annual value is to be computed and deducted; and the same is to be done where the proprietor has rebuilt or newly erected a mill, and occupies it himself, as it would be hard on the present incumbent if the whole expences of building were to be deducted out of the first profits. The mode (*w*) of accounting for the profits of mills as for personal tithes, that is, deducting expences, had been previously settled, (though afterwards (*x*) called in question) in a case in the House of Lords (*y*), and is now finally established. By the same case in the House of Lords, as well as by what has been before observed, it appears, that mills newly built pay tithe from the time of their erection; though (*z*) this was contrary to the opinion of the two chief justices, who held no tithe at all was due for such new mills, the same being a personal tithe, and of course wanting the support of custom. But the statute of Edward the Sixth, speaking of personal tithes (*a*) *generally*, may well be controlled by the former law of Edward the Second, which requires the payment of tithes from newly erected mills *speciatim*, and it is reason-

(*u*) 3 Anstr. 913. Gwill. 1460. Hall *v.* Machet.

(*w*) Vin. Abr. t. Dismes, M. 3. pl. 5. 1 Br. P. C. 157. Gwill. 596. Chamberlaine *v.* Newte.

(*x*) Gwill. 623. Dodson *v.* Oliver.

(*y*) 2 Wms. 463. Gwill. 676. Carleton *v.* Brightwell.

(*z*) Gwill. 598.

(*a*) *In toto jure generi per speciem derogatur, &c. Elem. Jurispr.* 4to. 1783. 36.

able, that the non-payment, which is to confer the privilege of exemption, should be constructively limited to things previously in existence. It is, therefore, settled by the cases (*b*) referred to, that new mills pay tithe. However, where the date of a mill's erection is unknown, and [46] no (*c*) proof is adduced of tithes ever having been paid, the court from such non-payment will presume it to be more ancient than the statute of *articuli cleri*, and so not tithable.

Another point seems long to have remained unsettled, namely, to the incumbent of what parish tithes of mills should be paid, whether where they are situate, or where the occupiers reside. A writer (*d*), whose fame is perhaps inferior to his merit, determines it to be, where the miller dwells and hears divine service, and (*e*) this doctrine has one judicial declaration in its favour. But the current of authorities is otherwise, tithes of mills being considered as predial in respect of locality, though properly personal as to the manner of accounting, and the quantum of payment; and (*f*) it is firmly established, that they belong to the incumbent of the parish where the mill is situated, and the business carried on, which agrees with the old law of France, "*decimæ* (*g*) *solvantur illi ecclesiæ ubi molendinum situm est.*" Yet tithes (*h*) of mills, like other personal tithes, are to be accounted and paid for annually at or before the feast of Easter.

The preceding observations relate only to water-mills, or wind-mills for grinding corn, and grain. If (*i*) such a

(*b*) Gwill. 355. 871. 1460.

(*c*) Gwill. 644. Hughes *v.* Billinghurst.

(*d*) Wood Inst. 163. 170.

(*e*) Gwill. 983. Wilson *v.* Mason.

(*f*) Gwill. 871. 1256. 1460. Hall *v.* Machet, from 3 Anstr. 913. Gilbert *v.* Gurney, Scacc. acc. though this matter was not moved.

(*g*) Rebuffus cited, Gwill. 356.

(*h*) Stat. 2 & 3 E. 6. c. 13. § 7. Gwill. 985.

(*i*) Gwill. 974. Wilson *v.* Mason.

mill privileged from its real or supposed antiquity is converted into one of a different description, and afterwards reconverted to its pristine use, it shall not lose its exemption, or become tithable as a new mill. But (*k*) where a [47] modus, or customary payment in lieu of tithes was pleaded to exempt a mill formerly used *in part* for grinding corn, and *in part* as a fulling-mill, but several years before the suit the fulling wheels were removed, and mill-stones put in their room, the plea was over-ruled by reason of such innovation, by which it became as it were a double corn mill, a new as well as an old one. In that case it not only appears, that a new mill built on the same stream as a privileged one, or a fulling-mill converted into a corn-mill shall pay tithe, but that even if new wheels and stones are added to a mill covered by a modus, by which the work of two mills may be performed, it is as two mills, and cannot be protected by the former modus. In the other case (*l*) just referred to, it was argued, that no mills are tithable but such as grind meal for food of men, or animals, nor then if only for home (*m*) consumption, not for sale; and it was suggested, that those mills only could be intended tithable, which were constructed for purposes in use at the time of passing the statute of *articuli cleri*. These general doctrines, however, were not in that case settled, nor were they involved in the judgment pronounced. But (*n*) it has been holden, that a copper-mill, fulling-mill, (unless (*o*) perhaps by special custom) shaving-mill, glass house, tin or lead mill, paper mill, or the

(*k*) 3 Atk. 17. Gwill. 782. Talbot *v.* May.

(*l*) Gwill. 974.

(*m*) No tithe is due where a mill is used only for grinding oats for the owner's hounds, Gwill. 1022. Hicks *v.* Tiese.

(*n*) Lit. 314. 2 Rol. 84. 2 Cro. 523. Gwill. 354. Johnson *v.* Dandridge. Rolle and Croke both state that a prohibition was granted, and so is R. A. 641. but in the same paragraph of the last book there is a latter case with the same names, *contra*.

(*o*) 3 Atk. 19.

like, pay no tithe, the profits in such instances arising from the labour and industry of man. The generality of this reason would not only preclude the profits of any manufacture from being tithable, but would also exempt fish, the tithes of which I am about to mention. We must, therefore, I suppose, understand, that the machines [48] above enumerated are *primâ facie* exempt from paying tithes, but may be subjected to them by shewing a custom for that purpose. Indeed, Easter offerings have been said (*p*) by a learned judge, to be a compensation for personal tithes, certainly a very inadequate one; for (*q*) though due of common right, it is at the rate of twopence only for each parishioner, except where it is customary to pay more.

I have already stated, that in strictness tithe of mills is not simply a personal tithe, but of a predial nature thus:

Where, by an act of parliament for enclosing certain common fields, on which a mill was erected, the Commissioners were directed to allot to the vicar a compensation for the vicarial tithes of their common fields, after the rate of ninepence in the pound; and the same was allotted accordingly; the vicar claimed tithes of the mill, insisting that they were personal tithes, and not payable in respect of the land on which the mill stood; that the mode of compensation presented by the act negatived the idea of its being a satisfaction for those tithes, ninepence in the pound, on the annual value, not being a mode of computing a compensation for the tithes of mills. But the Court declared that the tithe of a mill, though to be recovered in the nature of a personal tithe, is not to be taken strictly as a per-

(*p*) Bun. 174. Gwill. 662.

(*q*) Egerton *v.* Still, Bunb. 168. Gwill. 661. Laurence *v.* Jones, Bunb. 173. Gwill. 662. 889. 3 Burn Eccl. L. 20. Carthew *v.* Edwards.

sonal tithe; but is so far predial, and has so much reference to a certain place, in which it arises, as in the particular case before the Court, to fall within the description of a small tithe in respect of an old inclosure for which a sum of money had been appointed to be paid by virtue of the act; and as such that it was determined and was for ever extinguished.—The bill therefore was dismissed, but without costs, it being a new and doubtful question. (*r*)

2. The other species of personal tithes, to which I have just alluded, is that of *fish*. But fish taken (*s*) either in the sea, or in a common river, are not tithable, on the principle of their being *feræ naturæ*, unless by special custom. (infr. 152.) Where the claim is supported by custom, they are generally to be tithed in the same manner as other personal tithes, that is, a tenth of the profits is to be paid after costs deducted. And as tithe is only due by custom, so less (*t*) than a tenth by custom may be due. On the other hand, where the custom is express for paying tithes of fish in kind, it seems expences are not to be deducted, and so an incumbent or lay impropriator may be entitled to receive a much larger proportion than a tenth of the clear profits in respect of this, though a personal tithe (*u*). Both these decisions are alike sanctioned by the before mentioned statute 2 & 3 E. 6. c. 13. s. 11.

(*r*) Gaches *v.* Haynes, Gwill. 1256. See also Bennett *v.* Read, Gwill. 1283.

(*s*) Degge, p. ii. c. 8. 1 R. A. 630. Noy. 108. Holland *v.* Heale, cited in Williams *v.* Baron.

(*t*) The canonists allow this distinction between personal, and real or predial tithes, as to which latter such a custom cannot be maintained. Ayl. Par. i. can. 508.

(*u*) Noy. 108. 1 Lev. 179. Sheppard *v.* Penrose, cited, Gwill. *ibid.* See to the same effect Gwill. 621. Earl of Scarborough *v.* Hunter, which case is differently reported Bun. 43. and the concluding proposition therein that one tithe may be paid by custom, and one of common right (of fish), seems contrary to all the authorities.

by which parishes standing upon and towards the sea coasts, the commodities whereof consist chiefly in fishing, and which have used to satisfy their tithe by fish, shall pay their tithes according to the laudable customs used of ancient time within the forty years then last (*v*).

As to the question to what particular church tithes of fish shall belong, it is affirmed by Degge (*w*), to be the custom of South Wales, (and there seems nothing unreasonable that it should prevail elsewhere), "that if the "parishioner of one parish land his fish in another, the "tithes are divided between the parson of the parish "where the fisher lives, and the other where he landed "his fish; but if the parishioner land his fish in the parish "where he himself dwells, then the rector of that parish "has the whole tithes." Complicated and circumstantial claims and questions may arise on the subject between incumbents, and impropriators of neighbouring parishes, but unless the custom be explicitly clear, the (*x*) presumption appears to be in favour of the parish where the fisherman dwells.

Not only fish caught in the sea, or a common river, but those (*y*) kept in ponds also (where they may be considered in constant actual possession, and consequently the principle derived from their wild nature may be thought of less weight), when caught and sold, have been determined not to be tithable without special custom. It was in such case insisted, that they were wild in their nature; and as an additional reason, that they are *quasi* in the

(*v*) 3 Br. P. C. 479. Gwill. 691. Gwavas *v.* Kelynack.

(*w*) P. ii. c. 13.

(*x*) Gwill. 931. Williams *v.* Baron.

(*y*) Gwill. 616. n. 1581. Nicholas *v.* Elliot. See Degge, p. ii. c. 8.

realty, and go to the heir; which is equally applicable to pigeons in a dovecote; yet (*z*), young pigeons if sold, are [50] tithable of right without a custom. If (*a*) used in home consumption they pay no tithe, except (*b*), perhaps, by special custom. It is to be observed lastly, concerning this tithe of fish, that (*c*) where they are kept in a pond for the owner's pleasure and home consumption, not sold, or made profit of, no tithe is due, in which case it seems the allegation even of a custom to render them tithable, would not be allowed; although it hath been already, and will continue to be seen how materially custom may affect the right to tithes, and augment, or diminish, this ecclesiastical revenue.

II. A second (*d*) division of tithes is into *great* and *small*. Corn and hay universally, (though vicars may be specially entitled to limited portions, and descriptions of these articles), and wood, except so far as local usages prevail to the contrary, are accounted great tithes. All other predial tithes, exclusively of those above specified, and comprehending (*e*) seeds even of articles which, ripened to maturity, would be great tithes, as well as mixt, and personal tithes in general, are ranked in the class of small tithes. It has (*f*) formerly been thought by some judges, that the distinction of tithes into great and small might properly enough depend on the quantity. As if a large proportion of a parish were sown with flax, potatoes, or other product, being of the nature of small tithes, that

(*z*) 1 R. A. 635. Degge, p. ii. c. 8. Thompson *v.* Holt, Gwill. 671.

(*a*) Lit. 40. Gwill. 428. Anon. Hetl. 27 S. C. Hetl. 147. Flower *v.* Vaughan.

(*b*) 1 R. A. 642.

(*c*) Boh. 151. ed. 1760.

(*d*) Degge, p. ii. c. 1.

(*e*) Com. R. 633. Gwill. 749. Wallis *v.* Pain, Gwill. 889, 926. Clarke *v.* Stapler, 938. Cartwright *v.* Bailey, 1173. Jeremy *v.* Strangeways.

(*f*) 2 Vin. lect. 91. See Norton *v.* Clarke, Gwill. 428.

they would by these means be converted into great tithes, and would belong to the rector. But (*g*) this opinion has been decisively over-ruled; and it is now clearly understood, that the law denominates and adjudges tithes [51] to be great or small according to the intrinsic nature of the thing, not from the quantity, the mode of cultivation, or the use to which they are applied. Such (*h*) predial tithes as are of the nature of small tithes, must be set out pursuant to the statute of Edward the Sixth; as was resolved in the case of apples, and as appears the prevailing opinion in that of wood, but not positively so adjudged.

III. Tithes are sometimes divided into *rectorial* and *vicarial*. But this is a less proper distinction than the two former, not being like them founded on the nature of the tithable matters themselves, but varying according to particular endowments and local usages, that being in most places a rectorial, which in some comparatively few others is a vicarial tithe.

I proceed therefore to the second proposed head of this Chapter, namely, the legal questions, and controversies, which may arise between rectors and vicars; a subject closely connected with the division of tithes into great and small.

Tithes, as I have already stated, being due of common right to the rector, in questions between a rector and vicar, or between a rector and portionist, touching the extent of their respective rights, the rector is entitled to stand on his tithe at common law and to throw the onus probandi on the

(*g*) 2 Atk. 384. Gwill. 777. (*h*) Gwill. 430, 1. Norton v. Smith v. Wyatt, 5 Br. P. C. 580. Clarke. Gwill. 874. Sims v. Bennett.

vicar or portionist: and in the latter instance it has been thus held, though the rectors were for a long series of years in possession of the portion as lessees of it, and had by those means confounded the boundaries (*i*).

In a learned work (*k*) some remarks are made concerning the origin and endowments of vicarages; a more exact account of which, as to some points, may be collected from a case (*l*) reported at large by one of our earliest and best compilers, from which it appears, that appropriations were originally made to none but spiritual corporations sole, as a dean or abbot, who (*m*), thereupon, were formerly reputed to have the cure of souls as common incumbents have, and as the latter are parsons for life, the former and his successors became parsons for ever. After- [52] wards, and very frequently, appropriations were made to spiritual corporations aggregate; who could not collectively in the parish-church say divine service, nor minister the sacraments; and then it became necessary for those purposes, to substitute a vicar competently (*n*) endowed. From this source, and the subsequent dissolution of the religious houses, the ancient possessors, arose the great number of impropriate rectories at present in lay hands. The parties, whose consent was supposed requisite to forming appropriations, were the patron, the bishop, and the king as king, (I mean independently of his now acknowledged ecclesiastical supremacy), and as king con-

(*i*) Ferrars *v.* Pellatt, Gwill. 602.

(*k*) 1 Vin. lect. 315. See also Ward *v.* Britton, Gwill. 330.

(*l*) Grendon *v.* Bishop of Lincoln, Plowd. 493. Gwill. 136.

(*m*) As to spiritual rectors and vicars in the same church at this day, see Gibs. Cod. t. xxx. c. 13. 1 Burn eccl. l. 70. 4 Burn 10. 3 Com. d. 152. st. 43 G. 3. c. 84. § 12.

(*n*) 1 Vin. lect. 315-6. But see Hunston *v.* Cocket, Cro. Jac. 252. Gwill. 235.

tingently entitled to escheats, and to presentations by lapse, which contingent rights were annulled by appropriations. But sometimes the pope, claiming to be supreme ordinary, superseded the necessity of the bishop's concurrence; and such authority as the Roman Pontiff used to exercise, is now by various statutes transferred to the king (*o*); who may therefore create *de novo*, and vest appropriations in (*p*) spiritual corporations having succession, by consent of the patron, or where he is himself patron, without the agency of the bishop: but it is a prerogative not very likely to be called into exertion.

When (*q*) a vicarage hath long continued, an endowment, although no instrument thereof be shewn, shall be presumed; and the validity of the appropriation shall not now be defeated from that imputed defect.

The most common mode of endowment of vicarages, on appropriation, has been by allotting the small tithes (*r*) to that use, leaving the great tithes for the rector. Sometimes a vicar has, by a more special endowment, (*s*) [53] a described portion of the great tithes also, or of the glebe, or of the tithes of the glebe (*t*); and (*u*) sometimes he is in part, or wholly, provided for by a determinate annual sum of money. And indeed the rectory may be without glebe, for the parson may convey away all his glebe to the vicar: there are instances of compositions between the vicar and

(*o*) Alden *v.* Tothill, Gwill. 436-467.

(*p*) Qy. If to *lay* corporations, Gwill. *ibid.* where there is a profusion of learning on the subject.

(*q*) 12 Co. 4. Gwill. 158 Grymes *v.* Smith.

(*r*) See Cox *v.* Mason, Gwill. 506.

(*s*) See Willis *v.* Harvey, Gwill. 948.

(*t*) Barton *v.* Hellis, Fitz. 78. Gwill. 1613.

(*u*) See Gwill. 1090. in Lloyd *v.* Mortimer.

the parson by which the parson has given all his tithes and glebe to the vicar reserving a rent only for himself (*v*).

Of the dissolution of vicarages, the work (*w*) above referred to has shortly treated; and here it is necessary merely to observe, that a (*x*) vicarage once endowed is not re-united to the rectory by non-presentation of a vicar for a long series of years; but the new vicar presented by lapse becomes entitled to the tithes included in the endowment.

No (*y*) tithes belong *de jure* by original right to the vicar, but only derivatively under an endowment, or by virtue of a prescription, which supposes an endowment, one of which titles must be established in proof. It is (*z*) laid down that the original endowment cannot be prescribed against by the parson. And there is a (*a*) case transmitted to us by several reporters, where the vicar being entitled to small tithes generally, a customary payment to the (*b*) impropriator in lieu of the tithe of hops, being a species of small tithes, was not allowed to operate in defeasance of the vicarial claim. But this seems contradicted by (*c*)

(*v*) Edgar *v.* Sorel, Cro. Car. 169. Gwill. 435.

(*w*) 1 Vin. lect. 320, &c.

(*x*) 1 Cro. 873. Gwill. 221. Robinson *v.* Bedel. Where it is said, the not presenting is the default of the parson himself. It is true, that the impropriator is the regular and original patron, 1 Vin. lect. 317; but the impropriation and advowson may subsequently get into distinct hands by a separate conveyance of one or both of them. Gwill. 1128. Devie *v.* L. Brownlow.

(*y*) Pal. 426. Str. 87. Yel. 86. Gwill. 226. Grene *v.* Austen.

(*z*) Gibs. Cod. 720. cites Pring *v.* Child.

(*a*) Gwill. 522. Risden *v.* Crouch.

(*b*) 2 Kel. 612.

(*c*) 1 Mod. 216. Arg. in Bennett *v.* Read. Gwill. 1276. *ibid.* 1335. Ellis *v.* Saul, from 1 Anstr. 332. And vice versâ payment of the modus to the vicar is a good exemption against the impropriator. Bunb. 180. Gwill. 653. Woodnooth *v.* Lord Cobham.

other and more recent authorities ; according to which a modus or customary payment to the rector is a good bar to the vicar. For all tithes, great and small, belonged originally to the rector, who, though (*d*) not a necessary party to appropriations made when the church is full to take place upon avoidance, has yet been considered argumentatively, and in the abstract, as the endower of the vicarage, that being derived out of the entire rectory ; and the vicarage, therefore, has been supposed more recent than the customary payment, which is always taken to be of immemorial antiquity ; consequently, as to the small tithes in particular covered by the modus, the rector at the time of the endowment had not them *in specie* to bestow : besides, that the parishioners have an interest and claim to establish the custom of the modus. On the other hand, where (*e*) a lay impropriator claimed tithe of hay under a grant, which expressly mentioned it in the third year of James the First; but several instances were shewn of moduses or customary payment made to the vicar by parishioners, who had no tithable ground but meadow : this tithe was presumed to belong to the vicar, and to be covered by such immemorial payments, not having been received by any impropriator for one hundred and twenty years, which had elapsed since the grant.

And farther in favour of vicars (*f*), prescription may either supply the loss, and stand in the place of the original endowment where none appears ; or, where such instrument is produced, may operate in addition to what is therein expressed. Thus, in (*g*) case no endowment is forth-

(*d*) Grendon *v.* Bishop of Lincoln, Gwill. 146. Fox *v.* Adye, Gwill. 697. 2 P. Wms. 520.

(*e*) Bunb. 202. Gwill. 675. Stone *v.* Rideout, et infr. 164.

(*f*) Gibs. cod. 720.

(*g*) Gwill. 1232. Jackson *v.* Walker, *ibid.* 1248. Payne *v.* Powlett, *ibid.* 471, 2.

coming, but the vicar hath been used to receive *such small* [55] *tithes as have in fact arisen, it shall be presumed,* that he *was endowed of all small tithes arising and to arise;* and this presumption will entitle him to the tithe of new tithable matters of modern introduction, as virtually comprised within the endowment. On the other hand, where (*h*) an instrument of endowment is produced; and where the vicar has used from time immemorial, or for a long space, to take particular tithes, he shall not be concluded by their not being expressed in such instrument; but it shall be intended, that the tithes so constantly received were added to the vicarage by some (*i*) ancient and lawful, or voluntary (*k*) augmentation.

Where an endowment is expressed in words of ambiguous signification, usage must fix the construction (*l*). Thus, the word "*garba*" (which (*m*) has been variously understood, but properly means grain, or fruits of the earth bound up in sheaves), has (*n*) been determined to comprehend the tithe of hay or otherwise, and in favour of, or against the vicar, according as the custom has differently prevailed. So (*o*) also the words "*altaragium, et minutæ decimæ,*" (the former of which is very frequent in endowments) may, by reason of, and in conformity to ancient and established usage, give a right to tithe wood to the vicar, though this *de jure* is a species of great tithes.

(*h*) Hard. 328. Gwill. 514. Twiss *v.* Brazenose Coll.

(*i*) See 1 Vin. lect. 318.

(*k*) Perhaps not unfrequently; the same vicarage repeatedly so augmented, in Devie *v.* Lord Brownlow, Gwill. 1128.

(*l*) Broadley *v.* Brocklebank, Gwill. 1169.

(*m*) Gwill. 882, 3, 4, 8. 1157.

(*n*) Parsdale *v.* Smith, Cro. Eliz. 633. Gwill. 207. Gwill. 1244. Oglander *v.* Lord Pomfret.

(*o*) Degge, p. ii. c. 1. 2 Bul. 27. Gwill. 1573. Reynolds *v.* Greene. See also Franklyn *v.* The Master & Brethren of St. Cross. Bunb. 78. Gwill. 629.

Endowment, (*p*) or prescription which presupposes one, is, as we have before seen, necessary to entitle the vicar to any species of tithes. But it hath been judicially (*q*) declared, that when the vicar produces an endowment, [56] then the situation of the parties is reversed, the *primâ facie* title to the extent of the endowment is in favour of the vicar; and if the rector would claim any of the articles comprehended within the terms of it, the *onus probandi* is thrown upon him. In such case it is incumbent on the rector to give such clear and cogent evidence of a usage in the parish in his favour, with respect to the articles he would insist upon, as shall narrow the terms of the endowment, and induce a presumption that the parties interested in the tithes had come to some new agreement; that some different arrangement had been made with respect to the distribution of the tithes between the date of instrument (*r*), and the disabling statute of Queen Elizabeth. An instance of such attempt being made on the part of a rector occurred, where (*s*) competent proof having been exhibited of an endowment of the small tithes generally, accompanied by some slight and imperfect testimony of actual payment of them; on the other side there was produced written evidence of the vicar's being entitled only to a house, a close, and a small annual pension, which precise sum, indeed, it did not appear he had ever submitted to receive; the court referred it to the decision of a jury, whether the vicar was entitled to all small tithes. This case, and (*t*) another a few years preceding it, appear to confirm the position that an endowment is not conclusive

(*p*) Gwill. 1528. Awdry *v.* Smallcombe. See Ekins *v.* Dormer, 3 Atk. 534. Gwill. 800. and Baskerville *v.* Clarke, Gwill. 1567.

(*q*) Awdry *v.* Smallcombe, Gwill. 1528.

(*r*) 2 Bl. Comm. 320, 1.

(*s*) Gwill. 1258. Carr *v.* Heaton.

(*t*) Gwill. 1168. Fynes *v.* Ordoyne.

evidence of a vicar's rights, but that a variation may lawfully be made in it by new agreements confirmed by usage. In (*u*) another case, an issue having been directed to ascertain whether a specified parcel of lands usually paid tithes to the vicar of A. or to the rector of B. (who was [57] not a party to the suit), the jury found it had paid tithe to neither, but lay within the parish of A.; the court resolved, that the vicar being endowed of all small tithes within the parish, though (*v*) they have never been paid, has the same right to all within his endowment without usage, unless usage to the contrary be shewn, as the rector has of common right, and decreed for the vicar accordingly. Indeed, the court has peremptorily decided upon the construction of an endowment without any intervention of a jury, namely, (*w*) where a vicarage was endowed with the third part of the tithes of a manor, it was resolved, that the vicar should have tithes as well of the freeholds, as of the demesnes and copyholds. But (as may frequently be the case) where (*x*) intricate questions arise between an impropriator and vicar concerning the effect of endowments, and grants of augmentation, or concerning boundaries, and local situation, matters involved in the mists of antiquity, and obscured by the changes of time effectuated by drainages, inclosures, or the like, the court has usually remitted the solution of these difficulties in the shape of properly framed issues to the investigation of a jury, on some occasions aided by a formal *view* of the premises; without which approved mode of examination in controversies of this nature, the vicar's right, at least unless very clear

(*u*) Bunb. 87. Gwill. 627. Fox *v.* Rutty.

(*v*) Gwill. 1168. Fynes *v.* Ordoyno.

(*w*) Ow. 58. 1 Cro. 462. Gwill. 1568. Higham *v.* Best.

(*x*) Gwill. 1128. Davie *v.* Lord Brownlow, Carte *v.* Ball, Gwill. 797. Williams *v.* Williams, Gwill. 1165. See Sawry *v.* Collins, Gwill. 1181. and Garnons *v.* Barnard, Gwill. 1462. And see infr. 266.

and satisfactory, ought not to be acted upon by a court of equity.

It has been (*y*) determined, vid. infr. 168, that if a vicar is endowed generally of part of the glebe of the parsonage, he shall not pay tithes to the parson, *quia decimæ ecclesiæ ecclesiæ reddere non debet.* The (*z*) great tithes of such glebe belong to the vicar, although not en- [58] titled to any other great tithes within the parish, and to the vicar for the time being; insomuch, that *if a vicar so circumstanced demises his portion of glebe, which is sown with corn, and then dies, the next vicar shall have the tithe of the corn,* and not the impropriator: (supr. 23, 24. infr. 68, 69. 170.) on the other hand, if the (*a*) endowment is special, namely, that the vicar shall have so much of the glebe, paying tithes thereof to the parson, such stipulation must prevail; and constant payment of tithes to the parson by the vicar will be evidence to a jury, that this was in fact the condition of the endowment, in case the original instrument thereof is not to be found. Under (*b*) an endowment of small tithes generally, a vicar is not entitled to the small tithes of the parson's glebe, but if the endowment includes the small tithes of such glebe by express nomination, the parson himself shall pay them to the vicar. Thus in the case of a mill recently erected on the glebe, it was held, that tithes were payable for it by the parson to the vicar (*c*). If there be no vicarage endowed, the impropriator of the small tithes is bound to maintain a priest, and on information by the Attorney General for that purpose, the king may assign to the

(*y*) Gwill. 470. Walrick *v.* Cropton. Ibid. 537. Sanders *v.* Ryall.

(*z*) Ibid.

(*a*) Gwill. 470. Walrick *v.* Cropton.

(*b*) Cro. Eliz. 578. Gwill. 197. Blincoe *v.* Barksdale.

(*c*) Anon. Gwill. 286. See also Streatton *v.* Downes, Gwill. 536.

curate a proportion of the small tithes; but it is otherwise if the vicar be endowed to however small an extent (*d*).

There are in some parts what are called (*e*) *parochial chapelries* or *perpetual curacies*, of a nature distinct from mere chapels of ease, attributed in general to a presumed union of parishes, whence one has subsequently been considered as the consolidated parish church, and the presentation to it has been *cum capellâ annexâ*. These words may, indeed, confer on such presentee, when in full possession, the power of nomination to the curacy; but they also import the foundation of a chapel having substantive rights of its own. And the same may be farther evidenced by the accustomed solemnization of baptism and sepulture within the precincts; or by establishing in proof a prescription exempting the dwellers within the chapelry from contributing [59] to the repairs of the supposed mother-church. Such perpetual curate, except in being nominated instead of presented, instituted and inducted to his chapelry, *differs but little from a common vicar*, and is (*f*) capable of holding tithes; but *capable* only, and must like a vicar prove his claim. For here, the rule may be thought to

(*d*) Bonsey *v.* Lee, 1 Vern. 247. Gwill. 534.

(*e*) 2 Vez. 425. Attorney General *v.* Brereton. See also Yateman *v.* Cox, Gwill. 986.

(*f*) Gwill. 1345. Tamberlain *v.* Humphrey. The stat. 31 G. 2. c. 12. for the cultivation of madder, directs the appointed pecuniary payment to be made to every parson, vicar, *curate* or impropriator. In the case Bunb. 273. Gwill. 677. Price *v.* Pratt, the plaintiff, though calling himself perpetual curate of an endowed chapel, seems in truth to have been much in the situation of an ordinary curate; the supposed endowment being recent, instruments from the late and present vicar, to sue for tithes within the chapelry in such vicar's and his own name, and the appointment, though nominally for life, being revocable in its nature, he was therefore adjudged not to have such a permanent interest as to enable him to maintain the suit.

have peculiar force, that, without due proof to the contrary, the rector is entitled to all the tithes great and small within the parish..

Sometimes the controversy between a rector and vicar is confined to the simple question, whether the tithes in dispute are great or small.

I have already given a general description of small tithes, and have observed, that seeds, while remaining in that state, are so classed, though the produce from them, when come to maturity, may form a species of great tithes; thus clover seed (*g*) is of the former, and clover hay of the latter denomination. The following productions (some of them after much controversy) have been judicially ranked among small tithes, and when a vicar is endowed with small tithes generally, by such endowment belong to him. 1. All (*h*) manner of garden herbs, roots, and fruit; 2. The valuable article of hops (*i*); 3. Potatoes, (*k*) though sown in large quantities, which, as [60] we have before seen, does not alter the nature of the tithe; 4. Turnips (*l*), as it seems by the like analogy; 5. Saffron (*m*), though sown in a field which before produced corn, and then yielded tithe to the parson: And *e converso*, where a vicar is entitled to the tithe of hay, if a meadow is changed into arable, the rector shall have the tithe; 6. Cole seed (*n*) reaped from several acres; 7. Teazels

(*g*) Wallis *v.* Pain, Com. Rep. 633. Gwill. 749. Jeremy *v.* Strangeways, Gwill. 1173.

(*h*) Degge, p. ii. c. 1.

(*i*) Hut. 78. cont. but see Gwill. 522. Risden *v.* Crouch; ibid. 1539. 1557. in Knight *v.* Halsey, Com. R. 638.

(*k*) 2 Atk. 364. Gwill. 777. Smith *v.* Wyatt.

(*l*) 3 Burn, eccl. l. 438. Gwill. 944. Beaumont *v.* Shilcot, bill by vicar.

(*m*) Bedingfield *v.* Feak, Cro. Eliz. 467. Gwill. 166.

(*n*) Gwill. 533. Fish *v.* Wimberley.

(*o*) (a plant used by clothiers), though from their first introduction into the parish, the tithe thereof had uninterruptedly been paid to the impropriator; and lastly (*p*) woad, like most of the preceding, an article of considerable value, and expensive culture. On the other hand, tares (*q*) cut green, or harvested, and made into dry and winter fodder, have been adjudged as great tithes to belong to the impropriator, or his lessee, because as it seems they are of the nature of hay. As to peas and beans, in a case which a (*r*) vicar was by *custom* entitled to tithes of those articles planted and managed in a gardenlike manner, or to a composition in lieu of such tithes, his right was allowed to prevail. But this determination rests upon the ground of prescriptive usage: Without (*s*) a special endowment, or prescription regularly and properly proved, tithes of peas and beans, however, or wherever cultivated, are great tithes, and belong to the rector or impropriator, and they may be included under the term *decimæ garbarum;* it being supposed that they were ac-
[61] tually *garbed,* or bound in sheaves when the word "*garba*" was introduced into the canon law; since which time barley, oats, and peas have not been garbed; although wheat continues to be so, because the straw is of value, and it is of importance to preserve it unbroken.

In corroboration of the true distinction depending on the nature, and not the quantity, or the locality of the

(*o*) Gwill. 564, 5. n. Hunt. *v.* Codrington.

(*p*) Degge, p. ii. c. 1. Gwill. 428. Norton *v.* Clarke, 3 Cro. 28. Hutt. 77. Udall *v.* Tindall. See Andrews *v.* Lane, Gwill. 473.

(*q*) Gwill. 742-3. Steers *v.* Brassier, where indeed the vicar claimed tithes of hay, but entered into no proof, ibid. n. Hodgson *v.* Smith.

(*r*) 2 Br. P. C. 31. Gwill. 615. Austen *v.* Nicholas.

(*s*) Gumley *v.* Burt, Bunb. 169. Stephens *v.* Martin, there cited. Gwill. 549. 656. Sims *v.* Bennett, Gwill. 874.

things tithable. Lord Hardwicke C. in a case before him (*t*) declared, that if this sort of roots, namely, potatoes, should be called small tithes when planted in gardens, and great when planted in fields, it would introduce the utmost confusion, and must vary in every year in every parish. Therefore wheat (*u*), or corn sown in a garden or orchard, does not lose its genuine and intrinsic quality, but continues a species of great tithes belonging to the rector, and not to the vicar.

(*t*) 2 Atk. 365. See Norton *v.* Clarke, Gwill. 428. & supra 50.

(*u*) Mo. 909.

CHAPTER IV.

Things tithable of common right, and the manner of tithing them respectively.

IT must (*a*) not be inferred from the terms of the definition in the beginning of the Second Chapter, that "tithes are the tenth part of the increase *yearly* arising "from the profits of lands, &c." that this necessity of annual renewal is strictly and universally true of all species even of predial tithes. To mixt and personal tithes that part of the description does not at all apply. Indeed, if land hath once borne this annual burden, the principle is, that it ought not to be again charged in the course of the same year. Thus it has been held, that tithes are not due for turnips sown upon land as an after-crop where corn hath been the same year cut, and tithes paid for the same (*b*). But lands sown with clover (*c*), which hath a more frequent increase than once a year, ought, it seems, to pay tithe as often as the product is renewed. So tithe has been decreed to be paid for a second crop of turnips (*d*), though it was insisted they were sown for meliorating the soil against the next year's crop. On the other hand, it (*e*) was very early considered as no objection against the

(*a*) 2 Vin. lect. 97.

(*b*) Wright *v.* Elderton, Gwill. 607.

(*c*) 3 Burn eccl. l. 377. Gwill. 584. Witherington *v.* Harris.

(*d*) Gwill. 606. Hall *v.* Fitz. See also Benson *v.* Watkins, Bunb. 10. Gwill. 612.

(*e*) Gwill. 9. A. D. 1814. 7 R. 2. Because it is an *ordinary stated* renewal like the case of *saffron*, Gwill. 838. in Walton *v.* Tryon; but as to the entry, 7 R. 2. see its authenticity questioned, ibid. 831. 2.

tithable capacity of *sylva cædua,* or wood used to be cut, or lopped, that it was not renewed annually. In like manner, saffron (*f*) is tithable, though generally gathered but once in three years.

Of (*g*) common right tithes of *aftermath,* or [63] an *aftercrop* of grass mown from land before mown in the same year, where there is no prescription or custom against, or in discharge of the claim, ought to be set forth and paid (infr. 199). For otherwise there would be left open a dangerous opportunity of defrauding the rector. But the (*h*) occupier of land is not bound to make into hay the tithe of the grass, which he cuts. And, therefore, a (*i*) prescription that the occupiers of meadow ground within the parish have used to make the first vesture into hay, and pay the tenth cock in satisfaction of the tithe of such first vesture, and also of the aftermath, has been adjudged a good and legal prescription, and discharge of the tithe of the aftermath. So a man (*k*) prescribed, where the grass grew in wet places, that in consideration of his carrying it out of such watery ground and to another drier spot, to make it into hay, he was to be discharged from the tithes of the aftermath, and this prescription was also allowed to prevail. In another (*l*) case, where, in order to stay a suit in the spiritual court for the tithe of the latter-math of clover-grass, a custom was suggested, that every person having any meadow, or

(*f*) Wood, inst. l. Engl. 172. ed. 1763.

(*g*) 1 R. A. 640. Gwill. 531. Margetts *v.* Butcher, see 8 Vin. abr. 574. Wood inst. 165. 3 Burn eccl. l. 415.

(*h*) 1 R. A. 664. 2 P. Wms. 522. 3. in Fox *v.* Ayde.

(*i*) Mo. 910. 1 Cro. 660. Gwill. 473. Johnson *v.* Awbrey, Boh. 55, 56. ed. 1760. 1 R. A. 648.

(*k*) Gwill. 477. in Andrews *v.* Lane.

(*l*) Lut. 1071. Gwill. 571. Durrant *v.* Booty. See also Wood *v.* Harrison, Gwill. 970.

farm within the parish in which any clover grass has been gotten or arisen, hath been used and accustomed to make the first math or tonsure of the grass into cocks of equal quantities at his own costs and charges, and to set out the tenth cock for tithes for the vicar in full satisfaction of all and singular the tithes, as well of the former as of the latter mowing, and that the vicars of that parish have always from time immemorial accepted and taken [64] the said tenth cock accordingly; it seems to have been thought a good custom as laid, and no difference was made between the latter-math of clover-grass, and ordinary grass. But *exceptio probat regulam,* and the instances alleged are variations from the general doctrine, that without some special custom or prescription to the contrary, not (*m*) unreasonable in itself, aftermath is tithable.

On the other hand, *for after-pasture no tithe is due,* that is, the occupier of grounds which have paid the tithe of hay is discharged of common right from the tithe of agistment of the same land in the same year, because here the principle prevails, that one and the same land shall answer but one tithe for one year. On this point the (*n*) authorities are very numerous; in some of which the rule is laid down as well as to stubble-land which had paid tithes of corn, and was afterwards in the same year depastured by cattle, as fields from which hay had been mown. For this course or practice of after-pasture is not so open to fraud as that of aftermath. Neither does it impoverish the land agisted after its being cropped, and tithed. There is,

(*m*) 2 Bull. 239. Benson *v.* Watkins, Bunb. 10. Gwill. 612.

(*n*) Yel. 86. Gwill. 226. Greene *v.* Austen, Bunb. 7. Gwill. 613. Ayd *v.* Flower, Bunb. 78. Gwill. 629. Franklin *v.* Master, &c. of St. Cross, Gwill. 779. Chapman *v.* Keep, Gwill. 1335. in Ellis *v.* Saul, from 1 Anstr. 332. Tennant *v.* Stubbing, 3 Anstr. 640. Gwill. 1438.

therefore, a manifest difference between the cases. If (*o*) however there really was any fraud in the matter, and from a sinister view more grass was left by the scythe in the mowing than is usual, then it is reasonable that tithes should be paid for such after-eatage, or agistment.

Farther, tithe (*p*) shall be paid of the hay produced from orchards, though the fruit grown in them was tithed the same year as apples, pears, cherries (*q*), or [65] the like. And if such orchards are sown with any kind of grain, the corn shall be tithed. For the hay, corn, and grain are species distinct from the fruit.

I shall take this opportunity of mentioning also, that if a man sell his grass before it is cut down, the vendee thus commencing owner of it, and not the vendor, must discharge the tithe (*r*). The same (*s*) rule prevails as to nursery-plants, and corn: if they are sold standing, the vendee must pay the tithe; but if the owner pulls up the plants and sells them, or if he sells the corn after severance, such vendor is liable to this duty. So likewise where (*t*) a man sold the (*u*) toppings and loppings of oak, ash, and elm standing and uncut, the vendee cut them, and the parson sued the vendor for tithes; the suit as against the latter was dismissed, infr. 113. But the vendor (*v*) of wood cut by himself, and sold for fuel, is the party

(*o*) Boh. 57. cites 2 Bul. 238. not in point.

(*p*) Degge, p. ii. c. 3. 2 Inst. 652.

(*q*) Vide infra, 120.

(*r*) Lockin v. Davenport, Gwill. 472.

(*s*) Hard. 380. Gwill. 515. Grant v. Hedding. Gibbs v. Wybourne. Sir Wm. Jones, 410. Gwill. 501.

(*t*) Gwill. 537. Taswell v. Athill.

(*u*) Which it is there said are not tithable without a custom, but may be so by usage notwithstanding the statute of *Sylva Cæduæ* which usage an issue was directed to try.

(*v*) 1 R. A. 656. Ellis v. Drake.

to be charged. In the same manner, if a (*w*) parishioner severs his grass, and makes it into recks or cocks, and then sells it, no suit can be maintained against the vendee for the tithes.

After the preceding remarks in regard to predial tithes becoming due once a year, with the specified exceptions to that rule, and as to the respective situations of vendor or vendee touching the above matter, (considerations which seemed not wholly inapposite in this place), I proceed to the general subject of this chapter, namely, things tithable of common right. The principal of these are:

[66] I. *Corn and Grain.* These, and other predial tithes are by statute 2 and 3 Ed. VI. c. 13. required to be truly aud justly without (*x*) fraud or guile divided, *set out*, yielded, and paid: and no person is allowed to take or carry away the same before he hath justly divided or set forth for the tithe the tenth part thereof, or otherwise agreed for the same with the parson, vicar, or other owner or farmer of the same tithes, under the pain of forfeiture of treble the value of the tithes so taken away: and whensoever the said *predial* tithes shall be due, and at the tithing time thereof, it shall be lawful to every party to whom any of the said tithes ought to be paid, or his deputy or servant, *to view and see* their said tithes to be justly and truly set forth, and severed from the nine parts, and the same quietly and undisturbedly to take, and carry away. Here it may be first observed, that a custom or prescription of tithing without the parson's view of the proceeding, or of the nine parts from which the tenth is severed, is void: as was (*y*) determined in respect to fleeces

(*w*) 2 Rol. R. 78. Carmen's case. Wilson *v.* Bishop of Carlisle. See
(*x*) Vide infra, 252. Pemberton *v.* Beckwith, Gwill. 603
(*y*) Hob. 107. Gwill. 279.

of wool, a species of mixt tithes; it being insisted to be against common reason, that any man should judge or divide for himself, and then take choice of his own division; for the truth of the tenth depends upon the proportion it holds with the nine parts, and therefore, for the parishioner who is in the nature of an adversary to the parson in this case, to set out a part for the tenth, which he only affirms to be just, is to give him merely power to tithe as he thinks proper, and the prescription were as reasonable as to say plainly that he might set out what tithe he pleases. In regard to tithes denominated predial, of which I am now speaking, the reasoning as well as the words of the statute, pleads more strongly against the validity of such a custom or prescription as I have just mentioned. But on the other hand, there is (z) by [67] the general law no necessity for giving notice of the setting out of tithes, as hath been repeatedly decided, though alleged to be otherwise by the law ecclesiastical. In the last of these adjudged cases it was argued at the bar, that as to the view the statute was introductory of a new law; which tends to shew, that at the setting out of other than predial tithes, the parson has still no authority to be present; but I cannot think that the common law excludes him from inspecting a transaction in which he is so immediately interested, when he happens to be acquainted with the time of its taking place, and chooses to attend. Indeed we have just seen, that even a special custom to such effect is void; and though notice of a parishioner's intended time of setting out the predial tithes is not necessary generally, it (a) may be specially requisite by

(z) Noy. 19. Spencer's case, 1 R. A. 643. Chase v. Ware, 2 Vent. 48. Anon. Com. R. 22. Gwill 1579. Gale v. Ewer. But Sty. 342. cited in some of these books does not support this point.

(a) Burr. 1891. Gwill. 928. Butter v. Heathby.

virtue of a local custom for that purpose, such custom having been adjudged good and binding, and (as the chief justice thought) so intrinsically proper, that very slight evidence would be sufficient to prove it. Where (*b*) such custom prevails, an hour's notice is insufficient. The rector has other functions to attend to, which may detain him at the opposite extremity of the parish. The notice should be such as to give him time to inspect the setting out of the tithes, and to see that he is not defrauded of his dues. The custom relied on must, however, be positively alleged. For (*c*) where the lessee of an impropriator brought his bill for tithes of wheat, and other grain, and stated, that by the custom in that parish, the occupiers ought to give notice to the person entitled to the tithes of setting forth the [68] same, *or there was some other custom of the like nature*, and that the defendant had not given notice, and prayed an account, two objections were raised: First, the unreasonableness of the custom was insisted on, for the person entitled might live a hundred miles out of the parish; but to this it was answered, that notice to the servant would be good in that case: Secondly, it was objected, that the custom was alleged too uncertainly; to which it was answered, that the suit was not to establish a custom when greater certainty is required, because it is to be the foundation of an issue, which is generally directed before a court of equity establishes a custom; but here the custom is only brought forward as an inducement, or introductory title, to the demand of an account. But the whole court held this want of certainty to be a fatal objection to the custom as alleged, which being the foundation of the plaintiff's demand, they could not decree an account without first establishing the custom, and the bill was dismissed with costs.

(*b*) 3 Anstr. 640. Gwill. 1438. Tennant *v.* Stubbing.

(*c*) Bunb. 333. Gwill. 739. Beaver *v.* Spratley.

It has been (*d*) determined to be no excuse for not setting out tithes of corn, that the late occupier's interest in the land was expired at the time of his carrying the corn away. For although his interest in the land were expired, he remained owner of the corn; and if corn be cut down, and a stranger (*e*) take it away, before severance of the tenth part from the nine parts, yet an action on the statute will lie against him. And (*f*) if a parson or impropriator of a rectory sows land in his occupation, and sells the corn standing, the vendee, if he has not special words of discharge, must set out and pay tithes of such corn to his own vendor; and the carrying away of such corn [69] without setting out the tithes of it, is an offence within this statute. But the (*g*) parson cannot justify his coming to set out tithes without the consent of the owner.

This setting out of the tithes is indispensable. On no pretence is the corn to be removed from the field where it grew, till that is duly performed. For (*h*) where a defendant by his answer alleged, that after cutting his corn, the fences being bad, he removed the whole crop into the adjoining field for greater security, and then (after notice given in church), he tithed it, and no one coming to receive the tithe, he took care of it for four or five days, after which such tithe perished on the ground; and farther insisted, that such removal was not done with any fraudulent design, still the court on the hearing was of opinion, that the removal was unlawful, and decreed him to account. This decision, I presume, was founded upon the danger in

(*d*) 2 Cro. 324. 1 Brownl. 123. Gwill. 258. Kipping *v.* Swayn. Supra, 23, 24. 57, 58. infra, 261.

(*e*) The trespasser to be sued, Brownl. ibid. marg. and per Ley C. J. 2 Rol. R. 440. in Gwyn. *v.* Merryweather.

(*f*) 2 Cro. 361. Gwill. 276. Moyle *v.* Ewer.

(*g*) 1 Freem. 335. Gwill. 562. Anon.

(*h*) Gwill. 796. Thomas *v.* Rees.

any instance of countenancing such a practice, and the necessity of adhering to a settled principle on so important an occasion. The same principle seems to have governed the determination in a more recent (*i*) case. A bill was filed for tithes of wheat, which had been left standing very long from the wetness of the season. The farmer gave notice to the parson, that he was going to cut and carry what he could while the weather was fair. The latter attended, and the defendant proceeded to fill a cart-load, throwing nine sheaves into the cart, and laying aside the tenth sheaf for the tithes, which the plaintiff refused to take, unless he saw the whole tithes regularly set out before any part should be carried away: He did not object to the size of the sheaves allotted him, and they were sworn to be [70] equal to the others. It was urged, that here the omission of the usual form was justified by the emergency, and that the farmer need not adopt an unprofitable mode of husbandry for the purposes of tithing. But the court held, that the conduct of the farmer in not setting out the tithes, was not strictly correct, and could not be supported, and that an account of them was unavoidably to be decreed, but they decreed it without costs, thinking the plaintiff's case unfavourable. Neither, as it seems (*k*), can this practice of throwing nine sheaves into the farmer's cart, leaving the tenth for the parson without previously setting out, and exposing to view the whole number in the field where the corn grew, be justified even by alleging, and proving that such mode of tithing is conformable to the local *custom* of the parish. In another (*l*) case the customary mode of tithing stated in the answer, differed not materially, if at all, from the (*m*) common law mode (as it was called) of tithing wheat

(*i*) 3 Anstr. 682. Gwill. 1441. Franklyn *v.* Gooch.

(*k*) Bunb. 185. Gwill. 658. Boughton *v.* Wright.

(*l*) 3 Anstr. 640. Gwill. 1438. Tennant *v.* Stubbing.

(*m*) Ibid. 1440.

by sheaves, and was allowed to be good where that practice has obtained. But the custom as proved appeared to be, to make up the sheaves into shocks or threaves, in the size of which uniformity was not regarded, and that the tithes were never set out till each tenth sheaf came to the fork, and was thrown aside for the rector, he having no other election, or opportunity of judging of the fairness of his tithes, except by rejecting the tenth sheaf when about to be thrown aside for him, and taking the eleventh. It was insisted that this mode was illegal, it being essential that the parson should have an opportunity of seeing the tithes separated from the other nine parts, so as to compare the one with the other. Whether they are set out in shocks or sheaves, if the tithes are regularly set apart, he can see whether he has his proper proportion in number and dimensions. [71]. But in the present instance where the tithes are to be taken in the sheaves, and all the ten parts are put by the farmer into unequal shocks, the rector can neither compare the size of his sheaves with the others, nor can he calculate the number to which he will be entitled. Conformably to this reasoning, the court pronounced its judgment that the custom proved of the farmer's putting the sheaves into shocks, of uncertain and unequal magnitude, was highly prejudicial to the tithe owner, unreasonable, and therefore void; as it deprived such tithe-owner of an advantage, which the law always gives him of having the tithes so set out, that he may compare them with the other parts.

Moreover, the (*n*) setting out of tithes, though originally unexceptionable, may be construed a fraudulent severance by reason of the subsequent conduct of the occupier.

(*n*) Per Holt C. J. Gale *v.* 1579. Heale *v.* Spratt, 2 Inst. Ewer, 1 Com. Rep. 22. Gwill. 649. Gwill. 1571.

of the land; as if after taking away his nine parts, he turns his cattle into the ground, which destroy and consume the tithe; this seems within the coercion of the statute, if the person entitled to the tithe is not allowed a reasonable space of time for carrying it away. Indeed (*o*) after tithes are set out, the tithe-owner hath a liberty for a time convenient to come and carry them away, and this convenience of time is triable by a jury. If he (*p*) neglects so to do beyond a reasonable time, the occupier of the land where the tithes are left may at his election, either *distrain* the tithes as *damage feasant*, that is, interrupting the beneficial uses of pasturage and agriculture; or he may seek redress by *action*. But (*q*), though the tithe-owner has notice of the tithes being set out, and still neglects be- [72] yond a reasonable time to remove them, yet the occupier of the land cannot justify the turning in of his cattle where the tithes are, to depasture there, in the usual course of husbandry, by which means the corn and grain set out for tithes are eaten, or damaged. This is a matter of universal concern. The property in the tithe after it is set out is completely vested in the rector, or other proprietor, who must have a remedy for the destruction of such his property. As to the injury and inconvenience sustained by the farmer by the tithes being wrongfully left incumbering his ground, he must avail himself of one or other of the (*r*) legal remedies before-mentioned. On this point there have been repeated adjudications, in the last of which it was observed, that precedents inculcating the principle that a party should apply to the law rather than

(*o*) Per Jones J. in Mountford *v.* Sidley, 3 Bulst. 336. Gwill. 425.

(*p*) 8 Term R. 72. Gwill. 1608. Williams *v.* Ladner.

(*q*) Ibid.

(*r*) The form of action to be brought against the parson for not taking away his tithes, is an action upon the case, and not trespass *vi et armis*, because it is but a non-feasance, 1 Ld. Raym. 188. Shapco *v.* Mugford.

take the law into his own hands, ought to be adhered to in courts of justice.

The mode of tithing wheat by the tenth sheaf hath been already referred to, as prescribed by the common law. This is alleged to be the regular (*s*) legal course; and that if it be by the tenth stick, stook, or shock, it is by custom (*t*). It was formerly thought that the (*u*) custom of the place might still farther influence the manner of tithing it, as if the (*v*) custom had been to measure out the tenth part of the corn growing on the lands, it has been urged to be a good custom; but this seems contradicted by more recent authority (*w*). Of (*x*) common right, however, the owner of the corn ought to cut down and prepare the same, and to make it into sheaves, cocks, or [73] shocks; but the tithes being set forth, the farmer is not bound to watch, or look after them till the parson carries them away. If a (*y*) man prescribe to pay certain sheaves of corn for all tithes of corn it is not a good prescription, for he ought to make it into sheaves, and part of his duty in kind cannot be a satisfaction of the residue.

But if, according to the usage, the parishioner is to assume any additional trouble beyond the general line of his duty, it may possibly be otherwise. As (*z*) where the parishioners were at the charge, besides binding the corn into sheaves, of making them into shocks, and then setting

(*s*) Gwill. 961. 967. in Erskine v. Ruffle, divers cases cited.

(*t*) Lamb v. Tattersall, Gwill. 778.

(*u*) Godolph. rep. can. 393. Degge, p. ii. c. 3.

(*v*) Degge, p. ii. c. 3.

(*w*) Gwill. 1561. Knight v. Halsey.

(*x*) Wats. c. xlix. fol. 436.

(*y*) 1 Rol. R. 173.

(*z*) Latch. 226. Anon. Gwill. 9667. in Erskine v. Ruffle.

apart the tithes, and by virtue thereof, claimed to be discharged of tithes for the odd sheaves, which would not make a shock or stack, the custom was adjudged good as being founded on the valid consideration of the parishioners doing more than of common right they ought. The principle (*a*) seems not unreasonable, and the doctrine is adopted by Watson (*b*) and Burn (*c*). But it may be questioned, whether its authority is not over-ruled, or at least shaken by the following more recent (*d*) determination. The defendants to a tithe bill insisted on an immemorial custom to set up their corn and grain in *sticks*, being twelve sheaves placed in a row six against six; *or* in *stiches*, being ten sheaves placed in a row five against five; and that if there happened upon the whole quantity of corn to be any stick or sticks, stich or stiches, not amounting to ten, no tithe was paid of such under that number: The court declared the custom void, and therefore ordered [74] the defendants to pay tithes of all wheat, barley, and other corn, particularly for the tenth part of all the odd sticks or stiches of wheat, barley, or other corn, not amounting to the number of ten. The reasons on which the court proceeded do not appear, and we may observe some distinctions between the cases; for besides, that in the latter the custom is laid with some uncertainty, it makes a very material difference to the tithe-owner, whether the odd sticks or stiches, or the odd sheaves only, shall be exempt from being tithed. But notwithstanding what is stated of the farmer's not being bound to make the wheat into shocks for the parson's convenience of tithing them, I believe that in fact, according to the usual course of husbandry, the setting up of the sheaves into

(*a*) Recognized, Gwill. 967, 8. Woodshaw v. Hill, cited in Erskine v. Ruffle.

(*b*) C. xlix. fol. 436.

(*c*) 3 Eccl. l. 408.

(*d*) Gwill. 565. Trewin v. Bond.

shocks follows immediately after the binding into sheaves, so as that every shock in the same field shall consist of an equal number of sheaves, and then the (*e*) shocks are tithed, beginning at either end according to the election of the tithe owner, who is entitled to have separated for him the tenth part also of the odd sheaves under ten.

Here it may not be improper to mention, that it hath been adjudged, that by the general custom of the realm for the *rakings* (*f*) of corn, no tithes shall be paid. But this supposes no fraud to have been used, and the rakings to have been involuntarily left in the ordinary course of husbandry. If they are of great value, and with an intention of defrauding the parson more is left or scattered than might fairly and reasonably happen, they ought to be tithed.

It has been stated by the (*g*) court of Exchequer as [75] the general and irrefragable law of tithing, that each article is to be tithed after severance at that time, and at that stage of the process at which the parson can best see and judge, whether he has his fair tenth. We have before observed, that barley and oats are no longer *garbed*,

(*e*) There are cases to shew, that if in the shocks, it is tithable that way, Per. Cur. Gwill. 1511. Mantell v. Paine.

(*f*) Mo. 276. Grent v. Hunt, cited in Berd v. Adams, 1 Freem. 334. Gwill. 562. Anon. Gwill. 477. in Andrews v. Dane, 1 Cro. 660. Gwill. 473. n. Nicholl's case, cited in Johnson v. Awbrey, 1 Cro. 475. Gwill. 189. Sherington v. Fleetwood, 2 Inst. 652. 1 R. A. 645. pl. 11, 12. account for it from the Levitical law. Degge, p. ii. c. 3. In some of these books what are tithable are called fresh rakings. See also Green v. Hun, Cro. Eliz. 702. Gwill. 215.

(*g*) 3 Anstr. 954. Gwill. 1489. Collyer v. Howes. See Anon. 1 Freem. 334. Gwill. 562.

or bound in sheaves except (*h*) by the custom of particular places. A case (*i*) arose relative to this subject, in which the defendant insisted among other matters, 1. That it had always been the customary method for the farmers in the neighbourhood, to begin and proceed to cut, and get in their corn from time to time as was convenient for them, and as the weather permitted, and to set out the tithes of what corn they so cut without waiting till the whole crop in the field was cut down; and that if in a wet and unsettled season, a whole field were to be cut down before any part of the corn was to be tithed and carried, all the corn except in very small fields must almost always be spoiled. 2. The defendant stated that his tithes of barley and oats (called soft corn) were set out by the swarth except where measurement was found necessary from the effect of the wind, or the shape of the grounds, and that the remaining swarths under the number of ten were also measured, and the tenth part apportioned for the rector's tithe; that this was the customary method; that cocking or shocking soft corn was never practised by the farmers within the parish, or the country about it, and that the fairest and most unexceptionable way of tithing such corn, was by setting out every tenth swarth. At the hearing of the cause, which lasted several days, the rector's counsel, objected to the reading of any evidence taken relating to the custom of tithing in other parishes, and the court allowed the objection. And as to the first point, whether by the law of the land a whole field must be cut down before any part of it can be tithed, they were of opinion, that there was no such invariable rule: it holds good as to land in a common field belonging to different parishioners; the parishioner cannot cut half a land and tithe it, he must cut the whole land before he begins to tithe;

(*h*) Gwill. 967. (*i*) Gwill. 961. Erskine v. Ruffle.

but if the doctrine were to prevail in its utmost latitude, it would be inconvenient and prejudicial to the clergy, lay impropriators, and parishioners. Where the field is sown with the same, or with different sorts of corn or grain, and it is ripe at different times; or in case of catching weather, these are exceptions to the general rule. The particular quantity of tithe to be set out is variable according to the circumstances. In general, a reasonable quantity ought to be set out, so as to be worth the tithe-owner's sending for, enough at least for a load, where the size of the field will admit of it; if it will not, and the corn is equally ripe, the tithe of the whole field ought to be set out. As to the second point, the court was of opinion, that barley and oats ought of common right to be tithed in cocks, and that tithing them by the swarth ought not to be admitted contrary to the method of tithing settled by law. They therefore directed the defendant to account for the tithes of these articles as having been improperly set out, founding their judgment on this point, as appears by the report, chiefly on prior authorities. But the reason of the thing also had its weight. For it was (*k*) said by the Chief Baron on a later occasion, that the court held in the case above cited, that the barley must be collected into heaps, not by any similarity to the mode of tithing other corn or hay, but from the nature of the thing, that the swarth is not such a state of severance as enables the clergyman to see that he has just his tenth, and the article must therefore be put into [77] a proper state for that purpose before the tithe can be duly set out.

As to peas and beans, in a late (*l*) case, in which various

(*k*) Gwill. 1490. in Collyer *v.* Howes, see infra, 82. & in not. ibid.

(*l*) Gwill. 1504. Mantell *v.* Paine.

matters were introduced, complaint was made that the tithe of peas was set out, not in the cock as it was contended it ought to be, but merely from the hook as it was expressed, in little parcels almost in handfuls, and so intermixed, that it was impossible for the parson to husband it, or to carry it away. The court declared, there was no definite mode of tithing this article to be found in the books. They must, therefore, resort to principle, namely, that the tithe of it must be set out as soon as it comes into proper divisions or parcels, so as to let the tenth be seen, and judged of, and husbanded. But thinking they had not sufficient evidence before them to decide how far it was in this case so separated from the other nine parts, as that it was practicable for the parson to take the just tenth, they directed an enquiry to ascertain the fact.

Where a custom was alleged that the parson was to have every tenth land for the tithe of corn, beginning upon such land as was next the Church, and the occupiers of the land being aware what land would be the parson's, in order to defraud him, omitted to till, manure, or sow his land, as they did their own, the court held this to be a fraud, remediable by an action at law (*m*).

Having spoken of these principal articles of corn, and grain, before I proceed to other tithable matters, I shall here observe, that it is (*n*) not sufficient that the tithes have been set out unless the parson is duly permitted to enter and take them away; otherwise it is a fraudulent setting out, remediable by a suit upon the statute. The land-occupier cannot therefore justify obstructing the tithe-owner

(*m*) Stebbs *v.* Goodlock, Moore, 913. Gwill. 158. & infra, 252.

(*n*) 1 Bul. 108. Gwill. 1572. Anon.

from passing along the usual way for this purpose, though he might have come for the tithes another way. In a (*o*) suit for tithes about thirty years ago, the subject (among others) was discussed. Lands in the several occupations of two of the defendants had been before cultivated as one farm, and there was then a communication over part of [78] the grounds with a public highway, which communication was obstructed by the present occupier of the spot over which it lay. This would have been the nearest and most convenient road for the rector, the plaintiff, to carry off his tithe; he accordingly prayed as against this defendant of the name of *Stock*, to have the way in question opened to carry off his tithes arising upon the lands of another defendant; and he adduced some evidence to prove, that this line of road was in fact public highway. The court expressed their opinion, that this was not a case in which a court of equity could interfere; and clearly held, that if the road is a public one, the plaintiff's remedy is at law either by indictment, or in respect of special damage by action on the case. That the parson must undoubtedly have a right of way to carry off his tithes from the place on which they arise, and the occupier must open a passage for him, or he subtracts his tithes. Ordinarily the parson is understood to have a right to use the same road which the occupier uses. If the occupier has a right, the parson has the same. It is accident whether this way is more or less convenient, nearer or farther; its being the nearest cannot alone give the parson a right to pass over another man's land. There having been a communication when all the lands were in one occupation, which the parson might then have been entitled to use, because the occupier used it, is no argument in support of a claim to use it when the occupation becomes several. The se-

(*o*) Gwill. 1109. in Bosworth v. Limbrick.

veral occupiers may have no right to use it, therefore the parson can derive no such right from them. As against the defendant *Stock*, therefore, this bill was dismissed with costs.

The parson's accommodation is consulted in this respect also, that he is not bound by law to superfluous trouble in unloading his waggon of the tithes collected from the [79] grounds of some of the parishioners before he drives it on those of others. For (*p*) where the tithes of wheat being set out, the plaintiff's servants came with a waggon and horses to fetch them away; but the defendant, such waggon being three parts loaded with tithe corn from the lands of other persons, obstructed the taking of the tithes so set out, unless the plaintiff's servants would first unload what they had so brought; on their refusal, the tithes were left and perished on the ground, the plaintiff having declined to fetch them away at any subsequent time; this defence was holden insufficient, and the party making it was decreed to account for the value of the tithes, thus ineffectually set out, with costs.

II. As to the tithes of *hay and other the like articles*, grass (*q*) of common right is tithable when it is put into grass-cocks; and then, and not before, the tithes ought in general to be set out, because in that state of severance the tithe-owner may form a reasonable estimate, whether he has allotted to him his just tenth of the crop. The (*r*) parishioners are not by the general law bound to make the tithe grass-cock into hay, for (*s*) that which is due for

(*p*) Gwill. 775. Lake *v.* Bruton. See also Berney *v.* Chambers, Gwill. 673.

(*q*) Wats. c. xlix. f. 441. egge, p. ii. c. 3. 1 R. A. 644.

(*r*) 2 Wms. 522, 3. Fox *v.* Ayde.

(*s*) Hob. 250. Gwill. 432. Hide *v.* Ellis.

tithes is but the tenth of the produce of their grounds, not of their subsequent labour and industry. But the (*t*) custom of each place is in some measure to be observed; and therefore, if the custom were to measure out the tenth part of the grass standing for the tithe thereof, and that the parson should cut and make it, this has been deemed good: but now the validity of such custom seems overruled by (*u*) later and higher authority. On the other hand (*v*), if the parishioners have used to make the crop into hay-cocks before they have set forth their tithes, they [80] must do so still, but where there is no such custom, they may set them forth in grass-cocks. "However it has been recently held, that at common law, and without any custom, the hay must be partly made before the tithes are set out: That the parishioners cannot put the grass into cocks which are to be tithed immediately from the swarth: That they must first *tedd* it, that is, throw it abroad from the swarth, and afterwards gather it together again; then it being put into grass-cocks, the tithe may be set out; after which the parson comes upon the ground, throws it abroad from the cock, and completely makes it into hay. But it must first be *tedded* by the occupier of the soil. If in any particular case from the state of the crop, this process should not be required, that must be proved by the occupier (*w*)."

In all (*x*) cases when the tithe of the grass is set forth, and the occupier is not bound to make it into hay, the tithe-

(*t*) Wats. ibid. See Harrington *v.* Horton, 1 Bro. P. C. 140. Gwill. 594.

(*u*) Gwill. 1561. Knight *v.* Halsey.

(*v*) Degge, ibid.

(*w*) Newman *v.* Morgan, per Heath J. Campb. Ni. Pri. Ca. 305. and afterwards confirmed by the opinion of the court of B. R. 10 East T. R. 5. See Portinger *v.* Johnson, Gwill. 286.

(*x*) Wats. ibid. 1 R. A. 643.

owner may justify passing over the grounds of the former in his way to the place, in order to make the tithe-grass into hay, and may make it into hay there with as full authority as the occupier of the grounds himself, for this is a privilege necessarily incident to the right and enjoyment of such tithes. Where therefore (*y*) such an occupier refused to let the rector's agents or servants make the grass-cocks set forth for tithes into hay, on the ground, which produced the same (sheltering himself under the pretences of the inclemency of the season for hay-making, and the inconvenience and damage that must have accrued to him from such permission, both with respect to his own hay, and the ground on which it was to be made), the court declared, that the plaintiff was entitled to make his tithe-grass into hay on the defendant's lands where it grew, and ordered the defendant to account for its value. By parity of reason it had (*z*) long before been determined, that a parson shall be allowed a reasonable time to take his tithes severed from the other nine parts, and to dry (*verter*) before he carries them away; and (*a*) where the defendants in their answer to a bill by the proprietors of tithes, insisted that after the grass was put into cocks, it was the custom of the parish, that the parishioners were not to rake up the grass round such cocks, the court declared it to be a void custom, not to rake up their grass [81] into cocks, in order to setting out the full tithes thereof, and that the defendant ought to account for the tithes of such hay.

But if a (*b*) farmer cuts his grass, and only puts it into swarths, not making it into hay, and carries it away, and

(*y*) Gwill. 776. Crabb *v.* Hayne.

(*z*) Bro. t. Dirmes, pl. 12. cites 12 E. IV. 6.

(*a*) Gwill. 566. Staughton *v.* Hide.

(*b*) 1 R. A. 645. Crawley *v.* Wats, Wats. c. xlix. f. 439. Degge, p. ii. c. 3.

gives it *green* to his beasts of the plough for their necessary sustenance, not having grass sufficient to maintain them otherwise, no tithes shall be paid in respect of it. In general, however, tithe is to be paid for fodder given to beasts used for the plough or pail. As where (*c*) the demand was for the tithes of rough hay, grown in marshes, and fenny lands, it was suggested on behalf of the parishioners, that they paid tithe of hay and grain grown upon the meadow and arable lands, and because they had not sufficient grass within the parish to sustain their beasts in winter, they used to gather this hay, called fenny fodder, for their sustenance, and for the better increase of husbandry, and for this cause had been always freed from the payment of tithes of it. Such surmise was holden insufficient; for as to the allegation that they bestowed the fodder upon their cattle, it was not any cause of discharge, since by parity of reason they might prescribe for corn spent in their families, or consumed as provender, which would be unwarrantable defalcations from the rector's rights.

On the other hand, where (*d*) the surmise was, and it was found by a jury, that the impropriator from time immemorial had been seized in fee of a certain meadow, and held the same, and took the profits of it in lieu of all tithes of hay within the hamlet, though it were objected, that it [82] should be intended as parcel of the glebe, and that it ought to be expressly shewn to have been given in recompence

(*c*) Degge, ibid. 2 Cro. 47. Webb *v.* Warner, Mo. 683. S. C.

(*d*) 2 Cro. 501. Gwill. 1575. Moore *v.* Bullock. 1 R. A. 649. S. C. In which last book this matter is referred to the head of *modus decimandi*. "A particular piece of "wood land, or meadow land, se- "parately and immediately enjoy- "ed by the parson, may be a com- "pensation for the tithe of wood "and hay." Gwill. 1561. Knight *v.* Halsey.

of those tithes; yet the court over-ruled the objection, and adjudged that the meadow must be reputed to have been given in recompence of the tithes; and that thus, in regard of that land, the discharge of those tithes commenced.

Clover-grass (*e*) for all purposes of tithing seems not distinguishable from the ordinary species. Such also appear to have been the decisions in respect to (*f*) cinquefoil. And this principle seems to be extended to the seed of clover, for it has been (*g*) determined, that clover-seed is not to pay tithe at the mill, but that the tenth part of the stock is to be set out in the field, after it is severed from the ground. But if instead of being as in one of those cases converted into horse-bread for feeding hogs, or of being carried to the mill, it is sold and made profit of by the owner *as seed*, being in that state, as we have before seen, a species of small tithes; it seems doubtful whether in such case the tithe ought to be set out in the field in analogy to the nature of hay. Generally, however, the tithes of lands sown with clover, must be set out in conformity to the rule with regard to all hay. And in a (*h*) cause in which the court of exchequer had originally decided in favour of setting out the tithes of clover in the swarth, from an idea that it was commonly carried from that state without getting into the shape of cocks at all, they afterwards on the evidence before them, thought they had misconceived that fact, and that clover in almost every case is put into

(*e*) Bunb. 344. Gwill. 530. Pomfret v. Lauder. Accordingly a custom to set out the tithes of both in swarths was disallowed. Gwill. 584. Witherington v. Harris. And see supra, 76.

(*f*) Gwill. 535. Anon.

(*g*) Gwill. 1615. Lloyd v. Bentley.

(*h*) 3 Anstr. 954. Gwill. 1489. Collyer v. Howes.

cocks, sometimes only before carting, most frequently in a much earlier stage; that it was utterly impossible to ascertain with any precision the fairness of the tithe, if set out in the swarth; they, therefore, upon a rehearing, corrected their former opinion, and held that the fair and legal way of tithing clover like other hay, was when it has been put into the shape of cocks.

As in the case of ordinary grass (*i*), so clover and other artificial grass and tares, or vetches cut green, and given to cattle used in husbandry, pay no tithe, though according to (*j*) some opinions this exemption requires the aid of a special custom to support it. It seems, however, available without reference to any custom; but then it (*k*) is subject to this proviso, that there is not a sufficiency of other sustenance for the cattle, the court, in a recent instance, having thought it requisite to direct an inquiry to ascertain that fact.

Dr. Burn (*l*) describes the manner of sowing, cutting down, threshing, and dressing rape-seed, (which is done before it is removed out of the field,) and adds, it is usual for the occupier of the land, to agree with the tithe-owner for the tithe of it at so much an acre; it never having been determined in what way such tithe should be set out; but that the better opinion seems to be, that it should be set out by measure in the field after it is threshed and dressed, as most consistent with the necessary mode of its cultivation.

The same author reduces under this class the articles of fern, heath, furze and broom. The first of these is ranked

(*i*) Bunb. 279. Gwill. 679. Hayes *v.* Dowse.

(*j*) Degge, p. ii. c. 3. 2 Cro. 393. Meade *v.* Thurmama.

(*k*) Gwill. 1504. Mantell *v.* Paine.

(*l*) 3 Eccl. l. 417-8.

by Sir Edward Coke (*m*), among things freed from tithes [84] by the common law, and custom of the realm. But for heath, furze, and broom (*n*), it seems tithes shall be paid, unless the party sets forth, and proves an immemorial custom or prescription, that tithes have been paid of milk calves, or the like, in respect of cattle kept on the same lands, which is a valid cause of exemption. Another (*o*) common ground of exemption is, where these articles are spent in the parishioner's dwelling-house; but if sold, they are tithable. Lastly, furzes (*p*) used by the husbandman to make pens for his sheep pay no tithe, but (*q*) they are tithable, if employed for husbandry purposes in a different parish.

By particular statutes a pecuniary compensation is given to tithe-owners in lieu of the tithes of hemp (*r*), flax, and madder (*s*), namely, five shillings an acre, and so proportionably for more or less ground sown with any of those articles, to be paid before they are removed from off the land; for the recovery of which money the parson entitled, shall have the usual remedy allowed by law; but this is not to extend to charge any lands discharged from tithes by any *modus decimandi*, ancient composition, or otherwise.

III. The nature of *agistment-tithe* has been before in

(*m*) 2 Inst. 652.

(*n*) God. rep. can. 413. Wood, Inst. 166. 168. Gwill. 1028. Wolferstan *v.* Bragington.

(*o*) 1 Cro. 609. Austyn *v.* Lucas, 8 Vin. Abr. 591. Gwill. 610. Roffe *v.* Harding, Gibs. 680. Danv. Abr. t. Dismes, f. 597. For the house is for the maintenance of husbandry, 1 Vent. 75.

(*p*) Wood, Inst. 168.

(*q*) Gwill. 1022. Ellis *v.* Fermor.

(*r*) St. 11 & 12 W. 3. c. 16. made perpetual by st. 1 G. 1. st. 2. c. 26. § 2.

(*s*) St. 31 G. 2. c. 12. Contin. by St. 5 G. 3. c. 18. for 14 years, and to the end of the then next Session.

some measure explained. It is sufficiently apparent, that (*t*) this, though a predial tithe, is from the essence of it no [85] object of the general provisions of the statute of Edward the sixth for the setting out of tithes, and can afford no ground of action upon that statute.

Tithe (*u*) of agistment is due of common right, because the grass, which is eaten, is *de jure* tithable, and must have paid tithe if left to grow, and cut when arrived at maturity.

We have before seen, that this right accrues in respect of the grass eaten, and not of the improvement of the cattle, whether belonging to the occupier of the land, or agisted for hire. In all cases, therefore, the demand (*w*) is to be made against such occupier and not against the owner of the beasts, whether depasturing on grass grounds (*x*), or under agreement for the eatage of a field of turnips, or the like. This is a great relief, and accommodation to the parson, to whom it would (*y*) be burthensome to sue the several owners of the cattle: some of whom probably it would be difficult to ascertain, which might lead to endless litigation. All such trouble is avoided by a compendious demand against the ostensible occupier, who is accordingly liable, whether (*z*) he occupies his own freehold lands, or is in possession as a lessee. This, however, supposes the spot to be a private ground,

(*t*) Gwill. 1335. in Ellis *v.* Saul, from 1 Anstr. 332.

(*u*) 2 Sal. 655. in Hicks *v.* Woodson. See Grysman *v.* Lewes, Gwill. 166.

(*w*) Bunb. 3. Gwill. 1582. Underwood *v.* Gibbon, 9 Vin. Abr. 38. Gwill. 626-7. n. Fisher *v.* Leaman, notwithstanding, Gwill. 577. Coe *v.* Smith seems *contra.* infr. 114.

(*x*) Gwill. 659. Kershaw *v.* Isles.

(*y*) 1 R. A. 656. Facey *v.* Lange.

(*z*) Degge, p. ii. c. 5.

or inclosure. For (*a*) on the other hand, if the place where the cattle are depastured is an open common, or commonable land, the demand must of necessity be made against the respective owners of the beasts, because there is no profit or emolument forthcoming to the lord, or owner of the soil.

[86] At the beginning of this chapter I took occasion to mention, that land which has borne its annual burthen by paying tithes of hay and corn, is for the year discharged of tithe of agistment. If (*b*), however, an occupier, after the corn is cleared, sows the land with turnips, and then agists the sheep of a stranger, or fattens his own sheep and sells them, he shall pay tithe for the agistment, notwithstanding this course of husbandry meliorates the land for corn, where the soil is dry and sandy, by which means the parson obtains in the ensuing year *uberiores decimas*, for (*c*) if the turnips had been sold, and profit in that way made of them, they would have paid tithes.

As to the beasts agisted, they must in general be barren cattle, and yield no profit to the parson to entitle him to this species of tithes; though in the case last cited, it was thought no bar to the demand, that tithe of lamb and wool of the sheep so agisted on *turnips* had been before received. So tithes for turnips drawn from the ground, and given to dairy and milch cattle, though upon the farm and within the same parish in which the cattle were kept, have been held to be due. (*d*) If a pasture is eaten with

(*a*) Bunb. 3. n.

(*b*) Gwill. 537. Daniel *v.* Tuffnall. Bunb. 314. Gwill. 714. Swinfen *v.* Digby. Gwill. 606. Hall *v.* Filtz.

(*c*) Gwill. 540. Bordley *v.* Tims.

(*d*) Humphreys *v.* Stephen, Gwill. 593.

mixt cattle, partly profitable to the tithe-owner as milch cows, ewes, and lambs, and cattle used or bred for the plough, or pail; and partly barren and unprofitable, the (*e*) authentic and invariable rule seems to be, that tithe in kind shall be paid for the profitable, and agistment-tithe for such as are unprofitable: though Degge (*f*) suggests a doubt whether if the profitable exceed the others in number, they shall not exempt the rest; a surmise the more extraordinary from a writer in general so well disposed to the rights of the church.

It appears then, that what are deemed profitable cattle, and for the depasturing of which no agistment-tithe is demandable, are either such as render tithes more immediately, (that is to say), of their young, milk, and [87] wool; or such as being employed in works of husbandry, consequentially augment, and indeed are an efficient cause in producing those principal tithable articles, corn, and grain. On (*g*) a bill, therefore, for tithes for the agistment of barren and unprofitable cattle, generally, without expressly demanding them for sheep, the court refused to direct an account for the latter, it being the constant practice in suits for agistment tithes to demand it for sheep expressly, for they yielding lambs, or wool, are not reputed barren and unprofitable; and no agistment tithe consequently can be due for them, unless sold out of the parish before shearing time. Conformably to this decision, in a suit (*h*), in which the claim was explicitly made, it was decreed, that an account should be taken of what was due to the plaintiff for the tithe of agistment of all sheep kept, fed, and depastured on the lands occupied by

(*e*) Gibs. 677.

(*f*) P. ii. c. 5.

(*g*) 3 Anstr. 829. Gwill. 1456. Turner *v.* Williams, 1 R. A. 642. Dub.

(*h*) Gwill. 1048. Bateman *v.* Aistroppe, Gwill. 606. Smith *v.* Johnson.

the defendants, and *by them sold, or otherwise disposed of from the time of their last shearing, until they were sold off fat, and taken out of the parish for sale, and before the next shearing of them;* although it was insisted, that all the sheep, from time to time sold or removed, were as often replaced by others purchased by the defendants, and depastured in their stead till the next shearing day, when they paid a full tithe in kind to the impropriators, or their lessees, who were entitled to tithes of wool, and lamb, the tithe claimed for agistment in question in that cause being due to the plaintiff the vicar. A similar (*i*) decree was made in favour of the demand in a case, in which the sheep had been brought into the parish before shearing time in one year, but sold before shearing time in the [88] next: the claim was resisted on the ground, that the farmers in that neighbourhood found it necessary to fold sheep on their ground to manure it, considering the increase in the crop by this practice as the principal gain from the sheep; that they were like beasts of the plough, which pay no other tithe, except in the increase of the crop produced by their labour, and that the rector has his share in this profit. It was farther insisted, that the other profit arising from the sheep, the wool, had paid tithe, and that as they had not been in the parish a year, and had paid tithe of a year's wool, that was a discharge for the whole year. But the court, notwithstanding these arguments, thought the former adjudication decisively governed the present case, and decreed accordingly; and one of the judges considered (*k*) the wool-tithe as paid for the preceding year, and that as the defendant had kept

(*i*) 2 Anstr. 500. Gwill. 1424. Howes *v.* Carter.

(*k*) See Poor *v.* Seymour, Bunb. 313. Gwill. 713. n. Dummer *v.* Wingfield, acc. as to both these points. Coleman *v.* Barker, Gilb. Eq. Rep. 231. Gwill. 665.

the sheep for half of another year, and paid no tithe, agistment-tithe must be paid for that time. So that upon the whole it appears, that the tithe of agistment is calculable from the last time of shearing the sheep. It (*l*) seems also due for the agistment of yearling lambs.

But (*m*) tithe of wool may be due in one parish, and tithe of agistment in another. As if a man occupies a farm, and lives in the parish of A. and holds other lands quite distinct from the farm, and no way exempted in the parish of B., and depastures his sheep upon the lands in that parish, but shears them in A., the parson of B. shall have an agistment-tithe, because he has no other profit from those sheep. And (*n*) where the plaintiff as rector of Lilly demanded agistment-tithe of sheep which were shorn, and had dropt their lambs in the adjoining [89] parish of Offley, the common fields where the sheep fed lying in both parishes, it was objected, that it would be double tithing if the defendant having paid the tithe of wool and lamb to the vicar of Offley, were to pay agistment-tithe to the rector of Lilly; yet the court declared, that this was an inconvenience which the defendant had brought upon himself by not shearing a proportionable number of his ewes, and letting them yean their lambs in Lilly. *But if* (*o*) *the occupier of a farm in the parish of A. prescribe for common of pasture for a certain number of sheep on land in the parish of B., on which such sheep are occasionally agisted,* and that tithe-wool or other satisfaction has been immemorially paid to the rector of A. as often as the sheep were shorn in that parish, and

(*l*) Bunb. 90. Gwill. 629. Baker v. Sweet.

(*m*) Gwill. 1025-6. in Ellis v. Fermor.

(*n*) Gwill. 1030. n. Hatfield v. Rawling.

(*o*) Gwill. 1022. Ellis v. Fermor. See also Lambert v. Cummin. Bunb. 138. Gwill. 647. and infr. 182.

that it hath been the constant usage to shear them there, this is a good defence against the vicar of B. claiming agistment-tithe for the time the sheep were depastured in his parish, *though he derives no profit as tithes from them, chiefly it seems, because the right of common (which is an incorporeal hereditament) is legally reputed as* part *of the farm, to which it is appendant* or appurtenant. Otherwise it is of right of common (*p*) in *gross*, which is annexed to the person and not to land, the party entitled to which must pay agistment-tithe where the commonable land is situate.

It is to be observed, in regard to the topic we are now considering, that the statute which I have had, and shall continue to have very frequent occasion to mention, namely, 2 and 3 Ed. VI. c. 13. § 3. provides, that persons having tithable cattle depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithes for the *increase* of such cattle to the person [90] entitled to the tithes of that parish, or place in which the owner of the cattle dwells. The statute is silent concerning agistment-tithe (by name at least) for cattle so fed. And sir Edward Coke, (*q*) in his comment upon this act of Parliament, uses the same limits of expression, observing, that where the king ought to have the tithes within the wastes or commons in his forests *which are not within any parish*, this branch gives the tithes of the *increase* of cattle to the parson of the parish where the owner dwells. However, in a case (*r*) as early as the time of queen Elizabeth, it was ordered by the court of exchequer in reference to this law, that the tithes *generally* of a fen called Wildmore, *which was not known to lie in any cer-*

(*p*) Gwill. 1027.
(*q*) 2 Inst. 651.
(*r*) Anon. Sav. 60. Gwill. 156.

tain parish should be paid to the parson, or other proprietor of the tithes in the parish, in which the owner of the cattle inhabited: And it is added, that if the tithes have been immemorially paid to the parson of any particular parish, although it be unknown in what parish the moor or common is, there they shall continue to be paid according to the usage. For, by the statute, tithes ought to be paid as they have accustomably been paid. And (*s*) in the case of the common appurtenant above referred to, this law is referred to by two of the judges as if they considered agistment tithe to be clearly within its operation; one of whom says, that the provision for payment of tithes to the parson of the parish in which *the owner of the cattle lives,* implies, that in ordinary cases, not in the special case before the court, where *it is* known in what parish such a common lies, tithes are due to the rector, or vicar of that parish, for the cattle *feeding therein;* and he adds, that the determination of the House of Lords, which I am now about to mention, proceeded upon that supposition, meaning, I apprehend, in the sense of [91] the maxim *exceptio probat regulam;* since that determination forms another exception to the general principle of tithing where the agisted land is situate; which general principle was understood and presupposed in arguing the validity of the particular custom made the foundation of deviating from such principle in that particular instance. The case (*t*) was this; there being a large uninclosed common, lying between and extending itself into the several parishes of A. B. and C. and other towns, the inhabitants of which had from time immemorial in order to avoid multiplicity of suits, permitted a sort of promiscuous intercommoning on such open pasture; the right was

(*s*) Gwill. 1024, 5, 6. Mickleburgh *v.* Crisp. 9 Vin. Abr. 43. S. C. Abr.

(*t*) Bro. P. B. 278. Gwill. 604.

deemed to belong to the respective farms in each town, and taken to be part of those farms, and the owners of the cattle so fed always paid the tithes of them to the parson of that parish in which their farms were situated. The appellant rented one farm in A. and another in B., and paid tithes according to the aforesaid usage to the respective incumbents of those parishes, for his cattle fed upon the common. He also occupied five acres of meadow ground in the parish of C. for which he set up a modus or customary payment of two-pence an acre, and after that rate payment had been made or tendered to the respondent, the rector of the last-mentioned parish; yet as such rector he had sued in the exchequer for tithe herbage of this meadow ground, and also for the tithe of the feed of the respondent's cattle on the open common. The court of exchequer decreed, that the defendant there should account for the modus or customary payment, and should also account for the tithes of his cattle fed upon that part of the common which lay in the parish of C., there being proof that the cattle were driven upon that [92] part. But on the appeal, the house of Lords reversed the decree, because the custom that every farmer should pay tithes to the rector of the parish in which he lived was good, and the house ordered and adjudged, that the plaintiff's bill in the court of exchequer should be dismissed without prejudice to his right, according to the modus for the five acres of meadow ground in C. the respondent's parish. This authority was relied on as in point by one at least of the judges, who decided the before-mentioned case of common appurtenant. These several decisions appear to be professedly built upon distinct grounds, the one proceeding on the validity of the custom; the other on the legal argument, that the right of common was part of the farm, to which it was appurtenant; but

in effect, both these considerations will be found to contribute their joint support to each determination.

To revert to beasts of the plough, or such as are employed for the purposes of husbandry; these (*u*) by the general rule of law, as hath been already intimated, are exempted from the payment of agistment-tithe. An obvious and equitable restriction of the rule arises, where the cattle are depastured in one parish, and used in husbandry in another. In such case (*v*) they are subject to this tithe in the parish in which they are depastured. The reason is evident, provided they work in the same parish in which they are depastured, the *uberiores decimæ*, which are the effect of their labour falling to the lot of the same parson, who would otherwise claim the tithe of their pasture, are a satisfaction for the latter. If the cattle fed in one parish, labour in another, the parson of such other parish has the benefit; and he, where they are depastured, must have an agistment-tithe or none. The court in one instance (*w*) apportioned this tithe of agistment in conformity to [93] the above reasoning. The parson of *Swillington* sued in the ecclesiastical court for tithes of the cattle depastured in his parish. The defendant lived in *Kippax* the next adjoining parish, and occupied a large tract of arable land there, and had besides forty acres of meadow and pasture, and four acres only of arable land in *Swillington*. The court of common pleas being applied to for a prohibition to restrain the proceeding before the spiritual judge, declared, that if there had not been arable land in *Swillington*, it was without doubt that the parson ought to have had tithes. For the reason of exempting beasts of the plough

(*u*) Degge, p. ii. c. 5. Burslem *v.* Spencer, Gwill. 746.

(*v*) Gwill. 1110. in Bosworth *v.* Limbrick, Degge, p. ii. c. 5.

(*w*) 1 Ld. Raym. 129. Gwill. 1029. n. Scoles *v.* Lowther.

is, because they are employed for the improvement of the arable land in the same parish, by which the parson has better tithes of the arable land; but here that reason would fail. In the same manner where a man has wood in one parish, and arable land in another; if he uses the wood in making fences for his arable land, he shall pay tithes to the parson of the parish where the wood grows: but it would be otherwise, if the wood were in the same parish. The same law prevails, where the wood grows in one parish, and is spent for fuel in the owner's house in another. They then apply these illustrations to the question before them, whether the ploughing of the four acres in *Swillington* would excuse the cattle generally from agistment tithe; and they held clearly, that it would excuse only those cattle which ploughed the four acres, and not those which ploughed in *Kippax*. For the parson ought to have something in lieu of the tithe-herbage claimed, which compensation can be derived only from and out of the four arable acres in *Swillington*. Therefore a prohibition was granted *quoad* the cattle only, which ploughed the arable acres in *Swillington;* and as to the rest, the parson had liberty to proceed in the court below.

[94] A similar principle obtains in respect to cattle formerly used for the plough, but which have ceased to be so employed. For where (*x*) the plaintiff as rector exhibited his bill in the exchequer against one defendant as executor of his father, and in his own right; and against another defendant for agistment tithes for depasturing and fattening their oxen, and other unprofitable cattle within the rectory; and the defendant the executor admitted, that he had assets of his testator sufficient to

(*x*) Sho. P. C. 192. Gwill. 558. Coleman *v.* Barker. Gilb. Eq. Rep. 231. Gwill. 665. Sandys *v.* Eastmond. See also

answer the demand, and both the defendants admitted, that they and the testator had fatted oxen upon their lands, but alleged, that some of them were first used in tillage, and afterwards fatted when turned off from the plough; the court decreed tithe-herbage to be paid for the defendants', and the testator's oxen and unprofitable cattle not used for the plough, and also for those first used for the plough, during the time they were grazed and fatted for sale, after they were turned off from the plough. From this decree the farmers appealed to the House of Lords; and there, as to that part of the decree concerning oxen once used at the plough, it was among many other arguments insisted on the behalf of the appellants, that there was the same reason to continue the exemption after the cattle had ceased to be so employed, as there could be to allow it, during the intervals when they did not draw the plough. On the other side, it was urged, that the decree was supported by many prior resolutions, and was consonant to reason, because these cattle, though formerly used at the plough, ceased now to belong to it; that when the cattle feed in order to labour, the parson hath a tenth of the benefit thereby produced, but when they are turned off to be grazed and fatted only for sale, it is otherwise; and then tithe shall be paid for the herbage which they eat, they being in no respect beneficial to the parson in any other [95] tithes: that this was the settled distinction in the court appealed from: and upon these grounds the decree was affirmed.

Horses kept for agricultural purposes have the same exemption, as oxen so used, from agistment-tithe; as to this point the following case (*y*) recently occurred: The horses in question were kept by the defendant within the parish

(*y*) 2 Anstr. 498. Gwill. 1424. Filewood *v.* Button.

for his farm there, and were occasionally also sent to work at another farm occupied by him in an adjoining parish. The court declared, that they should have found some difficulty in deciding the case, if the horses had been habitually so used; but as their being sent to the other parish was *only occasional,* they clearly were within the general exemption in favour of cattle used in husbandry.

Farther (*z*) milch-cows, and young reared for the plough or pail, *as well as those actually so used,* are exempted from the payment of this species of tithes. Nor (*a*) is any agistment tithe due for cattle fed and killed by the occupier for the use of his family in the same parish. This plea of home consumption is a very common excuse from paying tithes of different kinds extending to a variety of articles, but not of itself available to procure an abatement as to the great predial tithes of corn and hay.

Another head of exemption arising from the description of the animals fed is the case of those (*b*), which are *feræ naturæ,* (see *infr.* 146,) as deer and coneys; for the pasture of which no tithe is payable, at least without a special custom to create such liability.

[96] Lastly, according to various authorities (*c*), *agistment-tithe is not due for saddle horses kept for the owner's pleasure, or convenience.* It is difficult to find any reasonable or strong ground of distinction between saddle-horses

(*z*) Degge, p. ii. c. 5. 1 Cro. 702. Gwill. 215. Green *v.* Hun, ibid. 1446. arg. 1 R. A. 646.

(*a*) 1 R. A. 647. Degge, p. ii. c. 5. Gwill. 861. Hele *v.* Bragg, and ibid. n. Robinson *v.* Tunstall. See also Underwood *v.* Gibbon, Bunb. 3. Gwill. 1582.

(*b*) 2 Inst. 651. Degge, p. ii. c. 5. Wats. c. L. f. 457.

(*c*) Degge, ibid. 1 Bul. 171. Gwill. 1571, 2. Pothill *v.* May. 1 Ventr. 236. Bunb. 3 Gwill. 1582. Underwood *v.* Gibbon.

kept for pleasure, and coach-horses merely as such. Yet in a case (*d*) in which the defendant had agisted both his saddle and coach horses, and admitted indeed in his answer, that he had occasionally employed them to fetch coals and draw manure on lands occupied by him in another (as it seems) adjoining parish, the decree was to account for the tithe of agistment of the coach-horses, and *other* barren and unprofitable cattle. The admission in the answer could only avail according to a judicial opinion before adverted to, provided the horses had been habitually so used out of the precincts of the parish. Burn, in his report of the case, says "the court were unanimously of opinion, that coach-horses were liable to pay "tithe of agistment." But it does not appear, that any difference was adverted to between them, and saddle-horses, the exemption of which is so well established; so that some doubt may still perhaps be entertained as to the general liability of coach-horses to agistment-tithe, though a question so likely to occur. This appears to be the only case in which the point was at all discussed, and perhaps not very fully in this instance; at least, the arguments have not been transmitted to us. In a much older suit (*e*) instituted against an innkeeper, who depastured the horses of travellers, for which there was no customary payment, the court were in doubt what decree to make for a certain rate to the parson, it not being fixed by usage, and they conceived that they ought to allow two shillings in the pound on the annual value of the land, that is, the tenth of such [97] value; but they agreed clearly, that tithes were payable for the herbage eaten by travellers' horses, and that it was so payable by the occupier of the lands. In those days the practice of travelling with post-horses had not commenced. At

(*d*) Gwill. 899. Thorpe *v.* Bendlowes, 3 Burn, Eccl. 1. 420. S. C. Gilbert *v.* Eversley, Degge, p. ii. c. 5. Wats. c. L. f. 455, 6.

(*e*) Hard. 35. Gwill. 502.

present, I apprehend, an innkeeper and post-master would be liable to pay tithes for the herbage eaten by his own horses kept for hire, and agisted by him on land in his own occupation, or where he has common of pasture.

In the last cited case was introduced the important consideration of the manner of receiving satisfaction for tithe of agistment: what is justly and truly due is the tenth part of the grass eaten; but this is scarcely possible to be ascertained. Degge (*f*) calls it with less accuracy a tenth part of the yearly value of the ground so depastured, which is rather a mode of appreciation substituted for convenience, than the real subject of demand. He adds, that commonly a twentieth part is accepted; and that in this, as in all other tithes, the custom and usage of the place is to be observed. Since, however, that author wrote, it has been (*g*) determined that a modus or customary payment of one shilling in the pound (that is, a twentieth part,) for pasture, according to the value of the land, is a void modus, as is also a modus for one shilling in the pound, according to the rent, the same being (as Burn remarks) no other than payment of part for the whole. Watson (*h*) seems to distinguish between the occupier's own cattle, and those of strangers; laying it down that where there is no special local custom, the tenth part of the money to be received for the agistment (meaning of [98] the cattle of guests) is to be paid to the parson, and then he adds, that tithes of barren cattle, by which he must mean the occupier's own cattle, are due of common right, according to the value of the land after the rate of two shillings in the pound, because such tithes cannot be otherwise valued, or accounted for; but he admits that by cus-

(*f*) Degge, p. ii. c. 5. 3 Burn, Eccl. l. 448.
(*g*) Bunb. 20. Smith *v.* Roocliff. (*h*) Watson, C. L. 465.
Bunb. 174. Harrison *v.* Sharp,

tom or prescription such tithes may be paid in another manner, as by the acre. Where no such custom obtains, it may be difficult to suggest and adopt a better or more convenient mode of valuation than this of two shillings in the pound, or a tenth of the rent or value of the land; a rule which appears (*i*) to have generally prevailed. But (*j*) whether even this criterion be perfectly just, may perhaps be questioned, because the *quantum* of the rent is not in the conusance of the parson; and because as to the value of the land he ought not to be under a necessity every year of trying that fact on any difference between him and his parishioners, at the peril of costs.

IV. *Wood* has been stated not to be tithable of *common right*, and consequently may seem not to belong to the present chapter; I shall briefly discuss this point. In (*k*) or about the seventeenth year of the reign of Edward the third, a canon was made at a provincial council under Archbishop Stratford, that tithes should be paid of *sylva cædua*. Hence (*l*) it is argued, that if the tithes of wood had been due of common right, for what purpose was that canon [99] passed? It may be answered, that the canon ought perhaps to be considered as declaratory, and not introductive of a new regulation, the term used being "*declaramus*," not "*statuimus*:" so far the reasoning appears not to be conclusive. Then it is added, that there was a petition in

(*i*) Bunb. 1. Smith *v.* Johnson, so decreed Hawkins *v.* Joyce, Marg. of Johnson *v.* Firebrace, Gwill. 660. though in the principal case there reported 1*s.* 6*d.* only in the pound on the rent was allowed, but on what ground does not appear.

(*j*) See Gwill. 587. Startup *v.* Doderidge.

(*k*) Degge, p. 11. c. 4.

(*l*) 4 Mod. 344. Gwill. 557, in Hicks *v.* Woodeson. See Bunb. 61. Gwill. 625. Jordan *v.* Colley, tithes are due of *sylva cædua* by the law of England. Boughton *v.* Hust-

parliament that same year, which (*m*) petition was couched in the following terms; "the commons pray that no man "be drawn in plea in court Christian for the tithes of "*wood, or underwood,* except in places where such tithes "have used to be paid. Answer, let it be done of this "as it hath been done heretofore." But in strictness this only proves that (*n*) there were districts (as the Wealds of Kent and Sussex) in which by custom no tithe of wood was or now is payable, and that therefore a county, or a hundred, not (*o*) a parish, or a few contiguous parishes, may prescribe for that exemption. Lastly, as to its being (*p*) urged, that where tithes are paid for things which yield no annual profit they must be due by custom. Lord Hardwicke C. has declared that *at common law, and by general right,* copse wood or underwood is subject to tithe, because from the nature of it the law takes notice that it is to be cut and let grow again in some certain course, though that renewal be not annual. However, therefore, the point was formerly understood, we may now, it seems, conclude on this high authority, that of all such wood as is not protected by the declaratory statute of *sylva cædua,* tithes are due at common law, and by general right. (*q*)

ler, 1 Barnard, 71. But the reporter is of little credit. See however Gwill. 1561. Knight *v.* Halsey, seeming to imply, that wood is no longer supposed to be titheable by custom only.

(*m*) Gwill. 3.

(*n*) It seems so understood, Degge, p. 11. c. 4. near the end. See Russell *v.* Partridge. Gwill. 270.

(*o*) 3 Anstr. 792. Gwill. 1442. Nagle *v.* Edwards, Gwill. 1509, 1511. Mantle *v.* Paine; nor a Town "of Wood *or any other tithe,*" 2 Inst. 645. nor a Liberty of what extent soever it may be, Gwill. 373. Johnson *v.* Bois, without specifying any kind of tithe in particular.

(*p*) 4 Mod. 341. Gwill. 557. See also Soby *v.* Molyns, Gwill. 134.

(*q*) Gwill. 828. Walton *v.* Tryon.

It is observable, that this (*r*) statute 45 E. 3. c. 3., which passed in the (*s*) then customary manner of enacting laws by petition and answer thereupon, was questioned by the clergy, who pretended that it did not pass as an act of parliament, but only as an (*t*) ordinance, and consequently not binding. However (*u*) a variety of reasons have been urged to demonstrate, that it is entitled to be considered, and always has been considered as an act of the supreme legislature, before (*v*) the enacting of which, much controversy had prevailed, and divers petitions had been exhibited in parliament relative to this subject. But the question has been long at rest, and the statute with its judicial interpretations has continued to be the rule of decision; having (*w*) in the forty-seventh year of the same reign received a parliamentary confirmation; nor do the clergy appear in any degree to have shaken it by the subsequent petitions, which they continued to present. For as to (*x*) the resolution or ordinance referred to in the beginning of this chapter, whatever credit is due to that entry (*y*), it contains nothing repugnant to the above-mentioned statute, which (*z*) is treated as declaratory merely of the antecedent common law.

By this statute then of *sylva cædua* it is in effect declared, that gross or great wood of the age of twenty or forty years, or of greater age, is exempt from the payment of tithes. The act is very ably expounded by Lord Hard-

(*r*) Degge, p. 11. c. 4.
(*s*) 1 Vin. Lect. 25.
(*t*) Ibid. 21.
(*u*) Degge, p. 11. c. 4.
(*v*) 2 Inst. 642.
(*w*) 2 Inst. 643. Gwill. 5, 6, 7.
(*x*) Gibs. t. xxx. c. 3. FNB. 119. 2 Leon. 80. In the last book it seems supposed prior to the statute of *sylva cædua*, though fixed, 2 Inst. 645. so late as 7 R. 2.
(*y*) 2 Inst. 645.
(*z*) 2 Inst. 642. Gwill. 831. in Walton *v.* Tryon.

wicke C. in giving judgment in a (*a*) cause instituted [101] chiefly for an account and satisfaction of and for the tithes of the loppings of ancient pollard, oaks, and ashes, and for the like account and satisfaction of and for as well the bodies of the trees as the tops of beech wood: First, as to what shall be deemed gross wood; this is explained to mean such trees as are (*b*) timber by the common law throughout England, namely, oak, ash, and elm; or such as are timber by the established custom and reputation of the country, which may be the case of beeches and other trees, but not to include trees occasionally used for slight repairs, like (*c*) hornbeam or maple; the subsequent application after felling, without proof of such custom, not deciding the tithable quality of the wood.

Of all such timber trees as I have just described, being of the age of twenty years or above, and thereupon being privileged by the statute, no tithes are payable either of the bodies, (*d*) bark, lops, or tops for whatever use (*e*) they are cut, with the exception of those instances in which a fraud is actually, or may probably, be committed on the parson. This exception is illustrated by a decision of Lord Hardwicke, C. who held that if (*f*) a man has a wood which is properly a copse wood, with a few timber-

(*a*) Gwill. 827. Walton *v.* Tryon.

(*b*) 3 Vin. lect. 28. Degge, p. 11. c. 4. 1 Inst. 53. a.

(*c*) Gwill. 829. pl. 470. Soby *v.* Molyns. Plowd. 470. Gwill. 133. Degge, p. 11. c. 4. 241. & 2 Inst. 643. *contra;* but see Gwill. 832. There can be no doubt hornbeam is not timber by the general law, though it seems it may possibly be so by custom. See also 2 P. Wms. 606.

(*d*) Doct. & Stud. dial. 11. c. 55. 11 Co. 49. a.

(*e*) Though Bunb. 99. n. cites cases *contra.*

(*f*) Gwill. 837, 8, Lord Hard-

trees in it, of above twenty years' growth, and when he cuts the copse wood, he makes a few loppings of these trees, and binds them up promiscuously together, [102] so as it is almost impossible to distinguish and separate the one from the other, the parson may demand tithes of the whole. But then he must shew the special matter, that the timber was so intermixed that he could not do otherwise; and this is right, because it was the owner's fault. On another occasion, the like considerations were apparently carried to more unqualified conclusions: For according to what is judicially laid down in one of our old (*g*) reporters, if woods consisting chiefly of timber-trees, with bushes and underwood intermixt, are cut down and made into faggots promiscuously, it not being worth while to separate the one species from the other, the timber trees shall privilege the whole; but if the woods are mostly of sallows and different sorts of underwood, and here and there *sparsim* grows an oak or other timber tree, and all are cut down and made into faggots indiscriminately, the whole is to pay tithes. This I believe was the origin of the doctrine of making the major part the criterion of the whole, which is adopted by (*h*) several compilers on the subject, though Dr. Burn says it can only be an argument of convenience, and cannot in any respect alter the nature of the tithe.

wicke cites 1 Cro. 347. Buckhurst *v.* Newton, n. ibid. If the case should be thought not fully to come up to all for which it is adduced, the doctrine may well rest upon his Lordship's own high authority, the report of the principal case in Gwill. being taken from a manuscript belonging to the family.

(*g*) 2 Leon. 79. Daws *v.* Mollins. But see the case as cited in Buckhurst *v.* Newton, 1 Cro. 347. and Gwill. 529. Turner *v.* Smith.

(*h*) Gibs. t. XXX. c. 3. 667. Ayl. par j. can. [505, 6.] Degge, p. 11. c. 4. 3 Burn, Eccl. l. 433. But see 1 Sid. 300. Hawes *v.* Cornwall. Gwill. 833.

Timber (*i*) trees of above twenty years' growth, having once acquired exemption from tithes, retain it, though at the time of felling they are become dry and rotten, fit only for firebote or fuel, and not to be used for the purposes of timber, such being called *dotards;* and though of late they may have been lopped once in every seven years, as the bodies are privileged, so are the branches. [103] In a case not (*j*) long subsequent to that in which the above resolutions were pronounced, the court again held, that the boughs of timber-trees above twenty years' growth were not tithable, notwithstanding the decayed state of the parent tree: but that although of a tree being once of twenty years' growth and never having been lopped, and then after the twenty years being lopped, every ten or every seven years, tithes were not payable for the lops; yet if a timber-tree is lopped *before* it is of twenty years' growth, (*k*) and afterwards it is lopped every ten or seven years, tithes shall be paid of such lops, because it had never acquired the privilege. These decisions had the ratification of Lord Hardwicke, C. in his judicial argument on the occasion above alluded to. But we find (*l*) him contradicting one part of the positions of Sir (*m*) Edward Coke, which on this, as on other subjects, have in general had the sanction of subsequent determinations; namely, that tithes shall not be paid for the germins or branches which grow out of the *roots* of felled timber-trees of what age soever, for that the root is parcel of the in-

(*i*) 1 Cro. 477. Ram *v.* Patenson. Gwill. 833. Mo. 908. Gwill. 542. Biggs *v.* Martin, contr. But see Gwill. 834. See also Witherington *v.* Harris, Gwill. 584.

(*j*) Mo. 908. Broke *v.* Rogers. Gwill. 833.

(*k*) But what if it ceases to be lopped for twenty years successively? It is said to become timber, and privileged, 1 R. A. 640. Degge, p. 11. c. 4. *tamen quære.* See Anon. Gwill. 165.

(*l*) Gwill. 832.

(*m*) 2 Inst. 643.

heritance. The contrary rule (*n*) his Lordship represents as having since prevailed, because great part of the copses, or underwood of the kingdom, are germins from such stools of timber-trees; and the opposite doctrine would deprive the clergy of tithes of many underwoods. Then to the question, what is the difference, whether the germins grow from the stools of trees entirely cut down, or from the tops of trees that have been only headed and lopped? he answers, that in the first case there is [104] no tree remaining whence they may derive the privilege; in the other there is. As to the oaks in question, he admits, that if they were topped, and made pollards before they attained the age of twenty years, and have continued to be lopped in the course of falls ever since, they will be liable to tithes. Therefore, this being a question of fact when he came to the decree, he offered the plaintiff an issue for a jury, to determine, namely, whether these trees were lopped before twenty years' growth, or not. As to the demand for tithe of beech wood, it not being disputed, but that it was above twenty years' growth; he said, that also then depended upon the question of fact whether beech be timber by the custom of the country; and his Lordship thought the terms of this issue should be whether by custom used from time whereof the memory of man is not to the contrary, beech trees growing within the parish of Mickleham, of which the plaintiff was rector, are and have used to be deemed timber. This might be found according to the truth of the case, and confining it to the parish would prevent any difficulty in respect to the precise limits of the place: indeed to direct the enquiry through a wider district might be productive of contrariety, as well as uncertainty. A third issue not relative

(*n*) Wood growing on stubs, or stems is tithable, Gwill. 529. Turner *v.* Smith.

to this species of tithes was proposed to the plaintiff to elect whether he would try it or not, who having finally waived trying any of the issues, his whole bill was dismissed, but without costs. This judgment, and the arguments contained in it, embrace the most material points in the law concerning the tithe of wood.

There is a short note of a (*o*) case in an old reporter simply stating, that young oaks under twenty years' growth, apt for timber in time to come, shall not render tithes. It is difficult to conceive what could have been in controversy [105] on this occasion: if lopped under that age, they were always deemed tithable. The same is the case of acorns from oaks of any growth. Ash and elm are upon the same footing as oaks, and so are such trees as are timber merely by the reputation and custom of the country. Therefore (*p*) it has been decided, that billets and faggots were exempt from the payment of tithes, for that the same were cut from trees of above the growth of twenty years before they were made pollards, without discriminating between oaks, and other timber-trees; and where the trees are clearly of a species to be denominated timber, the court has declared (*q*) they would presume the trees to be above twenty years' growth, unless the plaintiff demanding tithes proves the contrary.

The tithes, to which the quality of timber is most commonly ascribed by the custom, and reputation of places in

(*o*) Wray *v.* Clench. Mo. 908.

(*p*) Gwill. 84. 1 Morden *v.* Knight.

(*q*) Bunb. 126. Gwill. 645. Lloyd *v.* Mackworth. 3 Burn, Eccl. L. 431. says that in many places, where wood is plentiful and grows freely, it is the custom to estimate the same by measuring round the middle part of the tree, and if it is 24 inches in circumference, it is deemed of 20 years' growth, if under that measure, it is accounted underwood.

which they grow, are (*r*) beeches. Birches (*s*) may by the same means be privileged from tithes. Many (*t*) other trees, namely, horse-chesnuts, limes, aspen, and cherry-trees and willows seem to stand in the same predicament, that is, they are capable of the same exemption by proving the custom of the country. On the contrary, some trees, (*u*) as alders, hazels, hollies, and others, are of so mean account in this respect, that no custom or reputation as to them ap- [106] pears ever to have been set up, or insisted on. Those of this last mentioned description, of what age or bigness soever, are regularly to pay tithes.

Although, as we have seen (*supra*, 101,) the bark of timber-trees is not titheable, tithes (*v*) shall be paid of the mast, and acorns, because these are of annual increase. But (*w*) where the acorns fell from the trees, and were eaten by the owner's pigs, a suit in the ecclesiastical court for tithe of them was restrained by prohibition; for in order to become titheable, they must be gathered and sold, and then (*x*) they must be tithed it seems like other things plucked by the hand, by measure, or weight.

It has been (*y*) decided that broom made into bavins,

(*r*) 1 Rol. R. 355. Gwill. 358. n. Lapthorne *v.* ——; see Bibye *v.* Huxley, Bunb. 192. Gwill. 657. n.

(*d*) Ibid.

(*s*) Mo. 907. Foster *v.* Peacock, Mo. 1812. 2 P. Wms. 606. 2 Inst. 642. *contra.*

(*t*) 2 P. Wms. 606. Gwill. 357. Wright *v.* Powle, Hob. 219. Gwill. 358. n. Guffly *v.* Pindar. 2 Rol. R. 83, as to cherry, ash, and beech trees; and it is added, that aspen trees serve for arrows, which are for the defence of the realm.

(*u*) Degge, p. 11. c. 4. 11 Gwill. 543. Goodall *v.* Perkins. See Anon. Cro. Jac. 199. Gwill. 228.

(*v*) Degge, p. 11. c. 4. 11 Co. 49. a.

(*w*) Lit. 40. Gwill. 428. Anon.

(*x*) Gwill. 1554. Knight *v.* Halsey.

(*y*) Gwill. 542. Biggs *v.* Martin.

and that wood growing in hedge-rows, are titheable. This (z) doctrine as to the latter has been carried so far, that it has not been allowed to be exempted from paying tithes by proof of a custom in the parish to that effect, for that there is no difference between wood in copses and in hedge-rows; and such a custom or prescription amounts to a claim of being discharged from tithes without making any satisfaction in lieu of them, and is void in itself. This determination adds force to what was before argued; namely, that tithe of *sylva cædua* does not depend (*supra*, 98, 99,) upon affirmative usage, but is due *de jure*, by the general law, though it may be prescribed against in certain known and extensive districts, as the wealds of Kent and Sussex. As to (*a*) fruit-trees, if the parson has had tithe of the fruit produced from them, and the owner afterwards cuts down the trees, and of their wood makes billets and fag-
[107] gots, which he sells, he is not bound to pay tithe of such billets and faggots. Rolle assigns as a reason, that it is not a new increase. It is, indeed, the destruction of the subject from which any future annual renewal is to spring; but such is the case of all trees not being timber completely felled in thinning copses, and made into faggots for sale. Perhaps then the principle disclosed by Sir Edward Coke, from whom he takes the doctrine, is the founder; and he tells us, it is because the fruit and the faggots forthcoming from the same trees are not of several natures like fruits and corn growing in the same orchard, which are both titheable. On the other hand, if a man have (*b*) a nursery ground, out of which he sells fruit, and other trees

(z) Gwill. 1508-9. 1511. Mantell *v.* Paine.

(*a*) 2 Inst. 651. Baxter *v.* Hopes, 2 Inst. 652. 1 R. A. 641. Wood Inst. 168.

(*b*) W. Jones. 416. Gwill. 501. Gibbs *v.* Wybourne S. C. more fully reported 3 Cro. 526. 1 R. A. 637. pl. 6. but this pl. is said by counsel arg. to be full of bad law, Gwill. 1214. Adams *v.* Waller.

to be transplanted into another parish, he shall pay tithe of them: For though the trees are parcel of the freehold, while they continue in the soil, being severed from it in order to be transplanted, they cease to be so, in the same manner as carrot roots or the like; and if they were not titheable, the parson by means of such nurseries might be defeated of his dues from great part of the land in his parish. Rolle who argued this case, in his report of it mentions ashes, which at twenty years' growth are undeniably privileged as timber, but which by this authority appear when sold in this young state for transplanting to be tithable. By (*c*) a subsequent determination, the matter is carried somewhat farther, it being held, that nursery plants sold and transplanted *within the same parish* are tithable also; and I apprehend, with as much reason as any other product of the earth sold and made profit of among the parishioners instead of being carried to a more distant market. But as to what is said in this last case of trees yielding fruit which pays tithes, and others [108] yielding none, and of their being alike tithable, and that the former shall not privilege, or exempt the latter, when they are all sold together, I presume it is not meant to imply, that tithes were actually paid of the fruit of the fruit-trees, being probably young saplings before they were so sold for transplanting.

I may now properly advert to an extensive principle of exemption from tithe of wood founded on a regard to the purposes of agriculture and husbandry, from which occupations of life tithes principally arise, and are rendered more abundant. The (*d*) doctrine above alluded to, that the tithable quality of wood felled is not to be determined

(*c*) Hard. 380. Gwill. 515. Grant v. Hedding.

(*d*) See Gwill. 829, 830. Walton v. Tryon.

by the subsequent use and application of it, should perhaps be chiefly, if not altogether, understood in this sense, that its tithable quality does not depend on the design of using it *for repairs or for fuel,* which design may be fluctuating and uncertain; but as to these *two more general* purposes *abstractedly considered,* that the wood is tithable or not, according to its inherent nature before the felling of it. There is, perhaps, no case where articles not originally chargeable with tithe in their own nature shall become liable to that payment from the subsequent use of them: but as to exemptions grounded *on the above mentioned considerations of agriculture and husbandry,* the law is otherwise.

1. It (*e*) has been resolved that wood employed to hedge or fence corn, where the parson has tithe of corn, as he re- [109] gularly has without some special discharge, shall pay no tithe, and it was laid down as a general rule, that no tithes shall be paid for any thing *per quod decimæ fiunt uberiores,* that is, I suppose, by which tithes of the predial kind are increased; not universally all those of the mixt kind, as in some cases of milk, and young cattle. The wood privileged, (*f*) comprehends hop-poles and their

(*e*) Mo. 683. 1 R. A. 644. 1 Freem. 334, 5. Gwill. 562. Anon. See also Turner *v.* Weedon, Gwill. 524. But a defendant has in one instance been decreed to account for tithes of wood felled by him yearly at ten years' growth, and used in amending his hedges, and upon his land, and otherwise of no profit to him, which is I believe a single authority to that effect. Gwill. 608. Smith *v.* Williams.

(*f*) 1 Freem. 334. Gwill. 562. anon. contra as to hop-poles, Gwill. 563. Gee *v.* Pearch, but see 564. n. and contin. of 581, 2. S. C. Gwill. 1555. Bunb. 20. Gwill. 618. Bate *v.* Sprackling, acc. S. P. Degge, p. 11. c. 4. ad. fin. who cites White *v.* Arch, S. P. adm. Gwill. 1506. 1508. in Mantell *v.* Paine, Gibs. 684. 2 Inst. 652. "Albeit the house be new, yet it "is the husbandry is the main, &c." 2 Keb. 634. Watson *v.* Smith.

barks, where the parson or vicar hath the tithe of hops; osiers cut to make hurdles for sheep, and generally wood for maintenance of the plough or pail, or employed in making and repairing all utensils of husbandry. It is even (*g*) said to have been adjudged, where a man cut down wood, felling more than was sufficient to make hedges, and actually used the greater part in hedging, that even for the surplus of the wood cut for such agricultural purpose no tithe should be paid. Also (*h*) if a man cuts down his copse wood, and pays the tithes of it, and afterwards before any new germins spring he grubs up the roots and stubs of the wood, he shall not pay tithes of them, because they are parcel of the freehold, (*i*) and do not annually renew. It is true that the reason here assigned is not connected with the present topic; but may we not suppose another reason to have been also taken into consideration? I mean the view and purpose of clearing the ground: As in a case (*j*) where in answer to a bill by a rector for tithes, furze and bushes, which were cut and made into faggots and sold by the defendant, he insisted that no tithe was due, but being cut to clear [110] the ground, and prepare it for the husbandry purposes of tillage and grazing, and the bill was dismissed. But a prescription to be discharged of the tithe of underwood when used for fencing the corn, the tithes of which were paid to the rector, was disallowed, because it did not aver that the corn which was so fenced belonged to the party who claimed the benefit of the prescription, although it was strongly insisted that whether the corn was his property or not made no difference (*k*).

(*g*) 1 Cro. 499. in East *v.* Harding.

(*h*) 1 R. A. 637. Bedford *v.* Skinner.

(*i*) See Soby *v.* Molyns, Gwill. 134.

(*j*) Gwill. 608. anon. under Smith *v.* William.

(*k*) Croucher *v.* Collins, Saund. Rep. 14. Gwill. 1576.

2. For firewood (*l*) cut and consumed in a dwelling-house in the same parish, as it is generally asserted in many books, no tithes are due. This as to its origin is (*m*) ascribable to the same principle, being founded on the necessity of a habitation for carrying on the purposes of husbandry, on which tithes so much depend. Therefore, in a cause (*n*) where this defence was set up, the court declared, that as it appeared that the defendant had not any *house of husbandry* within the plaintiff's parish, but that the faggots in question were carried to the defendant's house, being out of the parish, and there burnt, tithes were due to the plaintiff for the same; and upon the like reasoning (*o*) it is laid down, whether authentically or not, that if a man hath a house of husbandry with lands, and demising the lands reserves the house, tithe of firewood is payable. It has (*p*) been made a question, whether this exemption of fuel is by the general law, or requiring the aid of a local custom to support it. Lord Hardwicke, C. (*q*) has given us his authoritative opinion, that wood cut to be burnt in the house of the parishioner within the parish, is exempt from tithe, not of common right, but by special custom only; and that it operates by way of customary exemption in respect of some satisfaction to the parson, which it is incumbent on the parishioners to shew. The increase of tithes arising from husbandry to which

(*l*) 1 R. A. 644. 656. Ellis *v.* Drake, and Austin *v.* Lucas, ibid. and 1 Cro. 609. S. C. 2 Inst. 652. 8 Vin. Abr. 591. Gwill. 610. Roffe *v.* Harding, Mo. 683. See Turner *v.* Weedon, Gwill. 524. & Anon. 1 Freem. 334, Gwill. 562. Thompson *v.* Holt, Gwill. 671. Burslem *v.* Spencer, Gwill. 746.

(*m*) Danv. Abr. t. Dismes, 597. 1 Vent. 75.

(*n*) Gwill. 543. Goodall *v.* Perkins.

(*o*) Gibs. 686. Hutton and Croke Justices differ as to this matter, Hetl. 89. Norton *v.* Fermer.

(*p*) 1 Freem. 334, 5. Gwill. 562. Anon.

(*q*) Gwill. 829. Walton *v.* Tryon.

a dwelling-house is essential may be thought to afford the parson such requisite satisfaction; and his Lordship relies on (*r*) a case in which, according to the cited report [111] of it, it seems adjudged that it is not *de jure per legem terræ* that any one is discharged of tithes for wood spent in his house, or *for fencing-stuff for hedges*. (*s*) This case, however, on another (*t*) occasion having been cited at the bar, was not thought decisive of the question, the court declining to come to any resolution upon the point, and stating that there were opinions both ways as to *fuel* where there was no custom; but they previously held that *hop-poles and wood for fences* were not tithable on general principles; and yet the other case seems to include them, as well as firewood. The truth is, very numerous authorities, some of which are above cited, speak often indiscriminately of wood used for agricultural purposes, and for domestic fuel, as exempt from tithes, without any intimation that such exemptions depend on local particular usage, and on the contrary seem (*u*) to refer them to the common law of the land, and these exemptions coincide with other parts of the system of our tithe laws. It may be added, that although in a late (*w*) case, [112]

(*r*) 3 Cro. 113. Norton *v.* Ferner, Gwill. ibid. n. but see S. C. differently reported, and finally determined, because of the custom alleged, and the verdict against such allegations, and by Croke and Yelverton, there are divers precedents otherwise *without alleging a custom*, Hetl. 88. 110. 117. Per Croke the parson had a benefit, for he had better means of tithes, Hetl. 89. and Gibs. 686. speaks of a house *of husbandry*.

(*s*) See Thompson *v.* Holt, Gwill. 671.

(*t*) 1 Freem. 334.

(*u*) 2 Inst. 652.

(*w*) Mantell *v.* Paine, Gwill. 1506. 1508. The point still therefore may seem doubtful, notwithstanding C. B. Parker's concurrence with Lord Hardwicke, that the exemption of fire-wood is only by special custom, Gwill. 965. and n. 960. and n. Erskine *v.* Ruffle. Both these great judges insist on the case

the answer of the defendant affected to support the exemption of wood used for husbandry purposes, or for fuel within the parish, by the allegation of immemorial custom to that effect, it does not appear that any such custom was substantiated in proof; and surely such proof was not necessary as to the wood used in husbandry, and yet both these grounds of exemption were indiscriminately admitted as legal by the counsel for the party claiming tithes.

3. It (x) is laid down, that if a man cuts wood, and burns it in making bricks to be employed in the repairs or enlargement of his mansion, within the parish, for the necessary habitation of himself and his family, no tithes shall be paid for such wood, inasmuch as the parson, it is said, has the benefit of the labour of the family. But if he extend his buildings for pleasure or delight, as it is expressed, beyond what is necessary for his family, he shall pay tithes; and the surmise to restrain the ecclesiastical court from proceeding, being only that he burnt the wood for the reparation and enlargement of his house generally, without saying for the necessary habitation of his family, that court was allowed to retain the suit, and by that surmise the judges of the king's bench declared he might build a castle, and yet pay no tithes. These points, which are adopted in the compilations of Degge and Burn, seem to coincide in principle with what has been before

in 3 Cro. 113. without adverting to the report of it in Hetley, which seems to make the other way, the C. B. quotes many other cases for and against his opinion, some of which I have not found, and some are not reported as to this matter. In Thomas v. the Duke of Beaufort, Gwill. 969. n. a custom for the exemption is stated in the answer, but does not appear to have been proved. Can the allegation or surmise avail without the proof? See 2 Keb. 634. Watson v. Smith.

(x) 1 R. A. 645. pl. 8, 9, 10. Nixon v. Browne.

mentioned as to firewood. But (*y*) underwood sold for fuel, or to be converted into charcoal, or for other general purposes, or employed in works of husbandry in another parish, appears clearly tithable.

Tithe (*z*) of wood is a predial tithe: it must, [113] therefore, be set out pursuant to the statute of Edward the sixth which ought to be done by the owner, or occupier upon the land at the time of falling. This setting out, (*a*) or the manner of payment of tithe-wood, must either be by measure of the ground by perches, or similar computation, or by setting out the tenth billet, faggot, or the like; but in this, says Degge, as in all other cases, the custom of the place is to be observed. Accordingly (*b*) when the custom was proved for the occupiers to bind up the wood before the tithes of it were set out, the majority of the court of exchequer were of opinion that the method used by the defendant in setting out his tithe-wood, namely, by loose heaps in boughs, was illegal, and that he ought to account for the value of such tithes. Many years antecedent to this decision, it (*c*) appears that the court after great debate declared, that the parishioner ought to stack, and faggot the wood which he sets out for the tithes. But here at least his duty ends; he (*d*) certainly is not bound, nor is it reasonable he should be

(*y*) 2 Keb. 634. Watson *v.* Smith, 8 Vin. Abr. 591. Gwill. 610. Roffe *v.* Harding, 838. n. Abbot *v.* Hicks, 1028. Ellis *v.* Fermer, 700. Bree *v.* Drew, 701. n. Waterman *v.* Jones, 577. Coe *v.* Smith, Gibs. 686.

(*z*) Gwill. 830. Walton *v.* Tryon.

(*a*) Degge, p. ii. c. 4. ad fin. See however Gwill. 1561. Knight *v.* Halsey, and qu. whether a custom to set out wood standing by such measurement, would now be deemed good.

(*b*) Gwill. 581. Gee *v.* Pearch.

(*c*) Gwill. 700. n. Brabourne *v.* Eyres.

(*d*) Gwill. 700. Bree *v.* Drew, 701. Waterman *v.* Jones.

bound to prepare the tithe-wood for the market, by converting it into hoops, staves, or any of the destined purposes of the other nine parts remaining at his own disposal.

I have before briefly considered the persons accountable for tithe of wood as between vendor and vendee of wood standing, or felled (*e*). The authorities there cited confirm what Dr. Burn advances (*f*) as the criterion that *he* shall pay tithe, to whom the other nine parts belong, [114] *when* the tithe becomes due, that is, at the time of felling. In a case (*g*) therefore, where the court declared, that tithes in kind were due for wood converted into charcoal, and decreed accordingly against the defendant, who was the purchaser of log-trees, and loppings and toppings of other trees for that purpose, we may observe that he had confessed by his answer that he *felled* the wood so converted, by which it appears to have been purchased standing, though still it may seem strange, that he should pay the tithe of the value of the charcoal, if such be the meaning of the decree, instead of the wood unmanufactured*.

V. I proceed to an article of great importance to the tithe owner in parts, where the growth of it is cultivated, that of *hops*. They have already been taken notice of as falling under the class or division of small tithes; whether the plant be indigenous in this island, or not, the cultivation of it for use has been comparatively stiled modern,

(*e*) Supra, 65.

(*f*) 3 Eccl. l. 460.

(*g*) Gwill. 577. Coe *v.* Smith.

* This is the same case, the correctness of which is, in a note above (*supra*, 85,) impeached, in making the owner of cattle depastured, instead of the occupier of the agisted land, liable to agistment tithe.

and in (*h*) many cases been judicially observed to have been introduced within the time of legal memory, which is carried so far back as the reign of Richard the first. Hops, therefore, stand upon the same footing as other things of late introduction. In a (*i*) judicial argument of chief baron Comyns, they are ranked with hemp, saffron, and tobacco; and it is declared all such *new* things shall be *minutæ decimæ*. Accordingly it has been in two (*j*) distinct cases decided, that a modus, or established custom of paying a definite pecuniary sum in lieu and satisfaction of the tithe of hops *being a late thing*, is a void custom, and not warranted by law, the court taking effective [115] cognizance that hops were not of sufficient antiquity to be the specific subject of a modus. But (*k*) hops, as well as other articles of novel introduction, may be covered by a modus for all small tithes in general, which operates to discharge (*l*) the land where they grow.

Tithes of hops as being of the predial kind must be duly set out; the proper way of doing this was the subject of much debate in a (*m*) late cause respecting this species of tithe within the parish of Farnham in Surrey. That suit in the form of it was an action by the occupier of the land against the tithe-owner for neglecting to take away his tithes of hops, after they were duly set out according to the usage of the place. The question was, whether

(*h*) Cited in Knight *v.* Halsey, Gwill. 1531—1565.

(*i*) Com. R. 638. Wallis *v.* Payne, Gwill. 1557. See Jackson *v.* Walker. Gwill. 1231.

(*j*) Sid. 443. Crouch *v.* Risden, Gwill. 563. Gee *v.* Pearch, Gwill. 1557.

(*k*) 1 Sid. 443. Gwill. 1557. The authorities to this purpose cited Bunb. 20. n. are not expressly to the point. Wats. c. xlix. f. 448.

(*l*) 2 Keb. 612. Crouch *v.* Risden.

(*m*) Knight *v.* Halsey, Gwill. 1531. See Bliss *v.* Chandler. Bunb. 20. Gwill. 625.

this usage, which was proved to have existed for a great length of time within the parish, of setting apart every tenth row, whenever the hops were planted in equal rows, and every tenth hill when they were planted in unequal rows, and in conformity to which the tithes in question were proved to have been set out, was or was not available to the occupier, as a valid and legal custom. Evidence was also adduced with some minuteness for the purpose of manifesting the practical expedience, if not necessity, of the custom insisted on. On the other hand, the answer in chancery of the plaintiff in the action was read, admitting his belief that the introduction and first cultivation of hops in Farnham, and elsewhere in this kingdom, were, with reference to what is termed legal time, modern and within [116] the time of memory; although the court takes notice of such being the fact, without its being specially proved. In this cause, which was finally determined by the supreme judicature of the Lords in Parliament, the custom was deemed void, pursuant to the opinions of the judges consulted, one only dissenting. They (*n*) argued first from principle, that all tithable articles, when newly introduced, are classed among others, to which they bear an obvious resemblance, and are accordingly reputed great or small, and are required to be set out and severed in a similar manner, with those which they resemble. The right of the parson to his tithes in kind accrues on the act of severance; his right to take them accrues when after severance, they are in the earliest stage of husbandry applicable to them, at which the tenth part may be visibly distinguished from the other nine; what shall be deemed a severance depends on the tithable subject. No other severance in articles of annual increase has been judicially recognized, except that from the soil, and that from the

(*n*) Gwill. 1532, &c.

parent stem. According to the principle which requires fruit, and seed, after they are gathered or collected to be set out by measure or weight, hops must be tithed, after being picked in the same manner. The flower of the hop is the sole object of cultivating that plant, of which it may be considered as the fruit, and it must be picked and gathered on the spot to preserve its quality and value. The judges then advert to the cases which had been cited, the latest of which was decided by the same high tribunal they were then addressing, and by which on appeal the decree of the court of exchequer had been in that cause affirmed. By this series of authorities they held it to be settled, that the severance of the tithe of hops is by separating the fruit from the stem. It is then established to be the general rule of the common law, that the [117] tithe of hops are to be set out by measure, after they are picked from the bind, or stem, and before the ensuing stage of drying (*o*) them. This being the general rule, they proceed to enquire, whether the particular usage insisted on in derogation of it can be legally supported. Such usage amounts to this, that the occupier shall, at his discretion, leave for his rector the tenth part of the hops, not severed as the common law principle requires it should be, but in a stage of husbandry short of that, in which he is entitled to receive such tenth part, and that without compensation. Calling upon the rector to incur expences, which he is not by law obliged to bear, comes to the same end as abridging the quantity of the tithe, since both alike reduce his profit. Three distinct things, besides the rules and principles of the common law, may control the right of tithe, namely, *custom, modus, and real composition*; which three rest on different foundations. Custom in respect of predial tithes, as these are, chiefly regards the manner of

(*o*) Gwill. 1554. See also Walton v. Tyers, Gwill. 841.

setting them out. Now the usage here insisted on cannot be referred either *to a custom, or to a modus,* both of which must be immemorial, because the cultivation of hops was introduced within the time of legal memory. Lastly, they agreed that the plaintiff's case could not be supported on the ground of a real composition, (which I shall describe hereafter, and which is more properly a discharge from tithes, than a regulation of the time or manner of tithing,) because here was no compensation, no mutuality of loss and gain, nor any evidence that such agreement ever existed. Upon this reasoning, and for (*p*) that the usage contended for by the plaintiff, would furnish to the farmer a strong temptation to defraud the parson, and would subject the property of the church to imminent peril, they thought the direction given by the judge, [118] who tried the cause, to the jury to find for the defendant, was rightly given, and a verdict having been found accordingly, and judgment thereupon entered for the defendant in the court of king's bench, that judgment on the writ of error with the bill of exceptions annexed to the record, was, after copious and elaborate argument, affirmed by the house. This great conclusive authority seems to render it superfluous to be particular here in stating the several anterior cases relative to the time and manner of tithing hops. But it is to be observed, that by the judges in this last case recognizing the rule of hops being tithable before the drying of them, both (*q*) the doctrine and the principle of it expressed in a much earlier resolution of the court of exchequer are confirmed, namely, that for fuel spent in fire to dry hops tithes should be paid, because the parson had no benefit by that, the tithes being paid before they were dried.

(*p*) Gwill. 1560, 1565. Anon. See also Sneyd v. Unwin.

(*q*) 1 Freem. 334. Gwill. 562. Gwill. 774.

VI. *Roots, seeds, fruits, garden stuff, and various products of the earth* (see *supra*, 65,) for the most part plucked or gathered by the hand appear by what hath been said under the last article to have in general the common property of being tithable, either by measure, number, or weight. The rule may, indeed, in some instances be subject to variation and exception. Thus with respect to (*r*) turnips, which are usually sown upon a considerable tract of ground, though a mode of tithing them numerically by throwing aside every tenth turnip for the vicar, appears to have been ratified by the court of the exchequer; yet they seem to have allowed it on account of the confined extent of the crop, admitting that it was liable to fraud, as there may be great difference in the size, and that it would be actual fraud if the small [119] turnips were assigned to the parson; and they declared, that if the quantity were sufficiently large, as if the growth of a whole field, or a whole acre, were gathered at one time, they ought to be set out in *heaps*, and the parson to have every tenth heap. As to potatoes, which in this respect bear a strong analogy to the last mentioned product, being generally sown in considerable quantities, it has been (*s*) determined where they were brought home to the defendant's house, and placed in a brewhouse, and there measured, and the tithe set out, that this was not a due setting out of this species of tithes, the parson having a right to insist that a tenth part should be separated from the nine upon the spot where the potatoes are dug and before they are removed; whether such separation may be accomplished by measure, or weight, is not stated;

(*r*) Gwill. 944. Beaumont *v.* Bunb. 10. Gwill. 612.

(*s*) Gwill. 1110. Bosworth *v.* Shilcot. Benson *v.* Watkins. Limbrick.

but one or other of those methods seems a juster course of proceeding than leaving them on the ground, either in computed heaps, or in parcels, each potatoe being numerically counted, inasmuch as they differ in size like turnips.

Peas and beans have been already spoken of on two former occasions, namely, under the division of tithes into great and small, (*supra*, 60) and under the head of corn and grain, (*supra*, 77,) when they are cut and harvested in a ripened state. It may be collected by what has been laid down under the article of hops, that when peas and beans are severed from the stem, and plucked green by the hand for the food of man, a different mode of setting them out must be pursued; and that in this instance they are immediately on such severance tithable by measure. It is, however (*t*) only when peas are thus gathered to sell, or to feed hogs, that they are tithable at all. If the occu- [120] pier gather them green to spend in his house, where they are accordingly eaten by the family, no tithe shall be paid of them by the law of the land, without the aid of a local or particular custom to effectuate the exemption.

Fruit (*u*) trees growing in gardens and in orchards pay tithes of the apples, pears, and the like, which are tithable immediately upon being gathered, and as it seems by measure. The (*v*) court has even ordered the defendants to account for the tithes of such apples as fall from the trees; and also, for the tithes of (*w*) wild and (*x*) black cherries, though in the latter case it was insisted in op-

(*t*) 1 R. A. 647.
(*u*) God. rep. Can. 408.
(*v*) Gwill. 581. Lister *v.* Foy.
(*w*) Gwill. 530. Anon.
(*x*) Bunb. 183. Gwill. 657. Chapman *v.* Barlow.

position to the claim, not only that they grew wild in hedges, and waste places, but that the trees served for fencing the grounds.

In respect to the tithes of orchards, a (*y*) party sued in the ecclesiastical court, in his answer there alleged, that the apples were stolen and never came to his use; and it seems to be a good defence. For this distinction was taken and admitted, that if I suffer one to pull my apples, the parson shall have tithes; but if they are taken by persons not known, the parson shall not have tithes of them, for they are not tithable before plucking. But a pecuniary composition for the tithes of such articles may be due by immemorial custom, which constitutes a modus. If (*z*) the custom be a parochial one, extending to gardens and orchards throughout the parish, then the enlargement of the ground so cultivated, or the plantation of a new orchard where such custom prevails, does not make tithe due in kind; but it is otherwise, if it be a special prescription for any particular garden, or orchard, infra, 184. 190. 194. 215. Accordingly it has been (*a*) adjudged that such pecuniary payment can only be for *ancient* gardens and orchards, when they are specifically, and individually, sought to be thereby discharged from tithes in kind. In like manner, (*b*) where it was insisted in answer to a demand of tithes of apples in kind, that they ought not to be so paid, for that a modus of fourpence for every hogshead of cyder had been for time beyond memory paid to the rector there, in lieu of all orchard-fruit growing within the parish, the court was of opinion that the pre-

(*y*) Heth, 100. Anon.

(*z*) 3 Burn's Eccl. l. 439. Wats. c. xlix. f. 447.

(*a*) Bunb. 79. Perrot *v.* Markwick, cited in Franklin *v.* The Master, &c. of St. Cross.

(*b*) Gwill. 535. Edgerton *v.* Follett.

tended modus or discharge of orchard fruit not made into cyder was a void custom.

It is here proper to mention that it was a great question in a (*c*) cause debated between twenty and thirty years ago, sometimes denominated the Kensington case, whether hot-house plants, as pine-apples, melons, orange-trees, and the like, were subject to tithes; the court of exchequer [121] being of opinion in favour of the claim, an appeal was brought to the house of Lords, and the following reasons were insisted on by each side respectively. In opposition to the demand it was urged, that such tithes, if any were due, must be of the predial kind, the definition of which was, that they arise merely and immediately out of the ground. The plants in question, it was well known, were not the produce of the soil of the country; a climate and a compost must be prepared for them to keep them in a state of vegetation; they do not grow in nor ever communicate with the natural earth, nor derive from it their sustenance; that as to pine-apples in particular, a principal source of expected emolument to the parson, the skill and labour of several years are necessary to be bestowed to bring them to maturity, independently of the great expence of hot-houses of the different classes, to which they are successively removed, tan, fire, and other articles; that they are subjects of traffic, and bought and sold in their several stages, and slow approaches to perfection, which is only attainable by the skilful management of artificial heat; and that they are frequently propagated in one parish, nurtured in the succession houses of a second, and pushed into fruit, ripened, and cut in a third or fourth. These remarks, relative to pine-apples, were applicable also to orange-trees, with the additional circumstances, as

(*c*) Gwill. 1204-1229. Adams *v.* Waller.

...large prime cost and a high duty on the
...rom these facts it was inferred, that if the
p... ...ies for these and other exotics was to be
added ... ...perose and expensive method of cultivation,
it must put an end to that species of horticulture. It was farther contended, that such hot-house plants as usually grow in the soil, but would not grow there without artificial heat, were not the proper subject-matter of tithing; and with respect to all other nursery-trees which frequently undergo many removals from parish to [122] parish before they are ultimately planted for use, it was submitted, that they ought not to pay a full tenth of their whole value upon each removal. Then as to the objection, that the facts urged as reasons against the liability to payment of tithes were not equally in evidence, it was answered, that supposing the court could not take judicial notice of what all mankind know, which was a position not to be admitted, and in many instances untrue, yet private knowledge of a notorious usage might have induced the court appealed from, to have directed an enquiry by the proper officer into these particulars, the result of which would have given them judicial knowledge. Lastly, the decree ought at least to have directed the officer, in taking the account, to have made fair allowances for the heavy expences peculiarly attending the cultivation of exotics, and not to have decreed an account generally, which if so taken must do apparent injustice to the appellants; wherefore the decree ought to be reversed, or at least varied. On the other side it was insisted, that the argument drawn from the expence, difficulty, and artificial mode of raising the productions, and from the nature of the soil, climate, and places in which they are raised, urged to shew that they are not tithable matters, or not tithable in kind, would equally serve to prove various other productions not tithable, or not tithable in kind,

which have always been admitted to be so, and would tend to make the same productions reasonably deemed tithable in some parts of the kingdom, which could not be so considered in other parts; and if exotics, as such were not tithable, few of the vegetable productions in this country being believed to be indigenous, the land would scarcely yield any tithable matters whatever; that if it were inconvenient that productions of this sort raised for sale should be adjudged tithable, or tithable in kind, which inconveniences in the present case the appel- [123] lants have occasioned, the incumbent having been always willing to accept a reasonable composition an acre, such inconveniences could be remedied only by an act of the legislature, and could not be removed by those who in their judicial characters and capacities were only to declare what the law is, at the time of pronouncing their judgment. And lastly, that it had been long settled, that plants, shrubs, trees, fruits, and roots planted, and raised in nurseries, and sold out again without having made an increase, are tithable in kind, and it is reasonable that they should be so considered. Such was the scope of the arguments submitted to the house of Lords in the cases of the appellants and respondent respectively, upon the question touching the more essential merits of the cause; but other points were in litigation. A composition in lieu of these tithes, and payments under it, were proved to have subsisted; did it or not require *notice* to be given to effectuate its determination, inasmuch (*d*) as the occupiers had set up an adverse title, by insisting that the agreement or composition was binding during the incumbency, and had filed a cross bill to substantiate such agreement; thus, as it was argued, they disclaimed the relation analogous to that of landlord and tenant, on which the neces-

(*d*) Gwill. 1217. 1220-1. Hume v. Wright.

sity of notice is founded. It appears, however, the house thought, that notice was necessary under the circumstances of the case. The notices actually given by the incumbent were dated the eighth of September to determine a composition, as from the Michaelmas-day following for the ensuing year, and the bill was brought for tithes in kind for that year. The house, therefore, propounded this question to the judges, whether a notice given upon the eighth of September is sufficient to determine a composition for tithes from year to year; such year commencing on the twenty-ninth of September. All the judges [124] present concurred in opinion that such a notice is by no means sufficient to determine such a contract, in consequence of which the decree of the court of exchequer was reversed, (infr. 227.) But the prior decision by that judicature, of the main point as to these exotic plants being essentially (*e*) liable to tithes, seems not to have been in any degree shaken by the event of the appeal; and that they are subject to such payment may, therefore, be thought supported by the authority of this adjudication as well as of superior reason, though perhaps it may be equitable that allowances should be made to the gardener in respect of the expensive, and extraordinary modes of cultivation, unless he can be duly compensated by the prices set on the nine parts destined for sale. Indeed, I believe it is very usual, and several books refer to such an arrangement, from motives of mutual convenience and moderation, for incumbents, and tithe-owners to agree with the occupiers of garden-ground for a stated composition by the acre, or the like.

Nevertheless in a much later case, in which an impro-

(*e*) Neither the expensive, nor the very precarious cultivation of *hops* was ever deemed a reason against subjecting them to tithes.

priate rector filed his bill against nurserymen within the parish for the tithes in kind of all the produce of the nursery grounds, as well for young trees, ordinary fruits, and garden stuff, as for pines, grapes, and all exotics produced, or brought to perfection in hot-houses, and green-houses; and the defendants admitted his claim to tithes of all the productions of their nursery grounds, which they had offered to settle and account for; but denied it in regard to any productions forced, or preserved in buildings, (that is to say) pines and other exotics, which they admitted they cultivated in their houses; insisting that those articles were not tithable: the court decreed that so much of the bill as prayed an account of pine-apples, grapes, and other exotics raised in hot-houses and green-houses, should be dismissed without costs; and that the rest of the bill should be dismissed with costs. (*f*)

[125] VII. *Honey and wax of bees* are the last articles which I shall here mention among this class of *predial* tithes, for they are so ranked and denominated by (*g*) Godolphin, (*h*) though they seem not to fall exactly within the definition. The (*i*) bees themselves are not tithable because they are *feræ naturæ*. But (*j*) the honey and wax are *de jure* tithable in kind. And (*k*) the manner of tithing them is by the tenth measure of honey, and by the tenth weight of wax. It is reasonable to imagine, that before the importation and use of sugar, the increase of English honey was more attended to and studied than it is at present, and that consequently this article then

(*f*) Worrall *v.* Miller and Sweet, in Exch. 19 Dec. 1801.

(*g*) Rep. Can. 389.

(*h*) C. xlix. f. 448.

(*i*) 1 R. A. 651. 3 Cro. 404. Gwill. 501. Marg.

(*j*) 1 R. A. 635. W. Jon. 447. 3 Cro. 559. Gwill. 501. Barfoot *v.* Norton. F. N. B. 118.

(*k*) God. Rep. Can. 389.

formed a considerable object in the tithing system. Yet I have not found its price noticed in the (*l*) accounts of provisions in the early reigns. But if in this respect the ecclesiastical revenues have sustained defalcation, the many valuable vegetable productions of novel cultivation, unknown to former ages, may be estimated as forming a more than adequate recompence, without speaking of the general improvements in agriculture, and the [126] much larger proportion than in ancient times of land in tillage.

I proceed now to the consideration of tithable matters of the species called *mixt* tithes.

VIII. Of this kind is the important article of *milk*. The (*m*) canon of archbishop Winchelsey, relating to milk, runs thus: "*decima vero* (*n*) *lactis et casei de vaccis, et capris proveniens, ubi cubant et pascuntur, ibi solvatur, alioquin si cubant in unâ parochiâ et pascuntur in aliâ parochiâ decima inter rectores dividatur* (*o*) *omnino.*" Here Dr. Burn (*p*) expresses a doubt whether, as the law now stands, the cattle shall not pay tithes in kind, only where they are milked, and an agistment-tithe in the other parish. Such double tithing, however, of milch-cattle seems at least not to be warranted by the authority which he subjoins, and which is the case of the par-

(*l*) Collected at the end of different reigns in Parl. Hist. vol. I. and II.

(*m*) Lynd. 199.

(*n*) "Sive vaccarum sive ovium "vel caprarum aliorumve anima- "lium de quibus colligitur lac." Lynd. 200. But it seems tithe of ewe-milk is only due by custom, for a prescription to be exempt from payment of it is good. 1 R. A. 654. Giles, t. xxx. c. 5. "This is "but to insist upon the whole "right against which the custom "has not prevailed." 1 Lord Raymond, 137.

(*o*) Non equaliter sed proportionaliter, Lynd. 198, but any such divisions.

(*p*) 3 Eccl. l. 450.

son of Swillington, and an inhabitant of the adjoining parish of Kippax before referred to, under the article of agistment: Such inhabitant had carried the milk of his cattle depastured in Swillington to his house in Kippax, and used it there. It was argued that if a man has arable land without a house, as was the case of the party here, who had no house at Swillington, he is entitled to be discharged of the tithes of the milk, which maintains [127] the servants, who plough the land, as much as if he had had a house, in which the milk was spent; but the court answered, that the law was otherwise, for it is of the same nature with wood that is burnt in the house, which is exempt from tithes only so long as it is so consumed. Such also is the law in respect of milk, which is discharged of tithes only because it is used in the house; it was therefore resolved by the whole court, that the parson of Swillington should have tithes of the milk of the milch-cattle depastured in his own parish; but of course he was not also entitled to an agistment-tithe, nor could it be claimed by any body else; consequently this case, if intended to elucidate the doubt above suggested, has not that effect; nor have I met with any express adjudication as to the tithe of milk, where the cows have been kept in one parish and milked in another. But the following (*q*) decision reported as extracted from the decree-book of the court of exchequer, where the cattle are stated to be both kept and milked out of the demandant's parish, requires explanation: The vicar of *Stepney* sued among other things for the tithes of milk, declaring his readiness to have accepted a supposed modus of sixpence for each cow in lieu thereof: The defendant not only insisted on the modus, but further that for the cows he had kept on a farm called *Red Lion Farm*, being always

(*q*) Gwill. 607. Wright *v.* Elderton.

milked in *Whitechapel*, he ought not to pay tithes, the farm-house being in the parish of Whitechapel, and he having paid tithes for them to the rector of that parish; yet the court ordered the defendant to pay for the tithes of all his milch cows, as well those kept on *Red Lion Farm*, as those in the parish of *Stepney*, at the rate of sixpence a cow yearly, although the same had been milked in the parish of *Whitechapel* (infr. 144.). The reasons of this judgment do not appear (*r*).

Another (*s*) canon of the same archbishop has [128] the following provisions: "*de lacte vero volumus, quod "decima solvatur dum durat, videlicet de caseo tempore "suo, et de lacte in autumno, et hyeme: nisi parochiani "velint pro talibus facere competentem redemptionem, et "hoc ad valorem decimæ, et commodum ecclesiæ.*" Hereby, as Degge (*t*) remarks, the tithe of milk is to be paid in cheese, whilst the parishioner makes cheese, at other times in kind; but, continues he, this part of the canon is generally over-ruled by the custom of the place; for in many places they pay milk in kind all the year, in some only cheese, and in some, neither milk nor cheese, but a small rate instead of either; and the (*u*) custom in this as in all other tithing is to be observed notwithstanding the canon. He adds, (*v*) however, soon afterwards, alluding

(*r*) If the modus were personal as to all the parishioners keeping cows any where, it would have included cows kept on a farm at any distance, as well as on a farm in the adjacent parish; or perhaps the difficulty may be solved by supposing that *Red Lion Farm* extended into both parishes.

(*s*) Lynd. 194.

(*t*) P. II. c. 6.

(*u*) But a custom, manifestly unreasonable, will in this, as in other instances, be disallowed. 1 Lord Raymond, 358. Hill *v.* Vaux. Shortly mentioned Gwill. 1113.

(*v*) Degge, p. II. c. 6, near the end. See Burslem *v.* Spencer, Gwill. 746.

to the same provincial constitution, that where tithe milk is paid, there no tithe cheese is due, and so *vice versâ*. Yet a distinction has been taken between the two articles; for (*w*) it is laid down, that a prescription to pay the tenth cheese made from May-day until the first of August, in recompence for all tithe milk for the whole year, is good, [129] because that is the effect of labour, and is not due of itself, and therefore, it is a good discharge: on the other hand, to pay the tenth quart of milk is not good, for that is not what is due, milk according to our law not being tithable by measure; but the chief justice held that to pay the tenth quart of milk at the parsonage-house, or at any other place, is good. In like manner, (*x*) if the custom be to carry the tithes of milk, however separated from the nine parts, to the parsonage-house, or to the church porch, such custom must be observed by the parishioner. To (*y*) a bill filed in the exchequer insisting on such custom of carrying the tithe milk to the church porch for the use of the parson, the defendant by his answer stated, that he had set out every tenth meal of milk in clean pans or vessels, and that the plaintiff having neglected to carry it away in a reasonable time, he, the defendant, had thrown it upon the ground, and he denied the custom alleged, and prayed an issue to try it. It was proposed, on behalf of the plaintiff, to read depositions taken in a former cause between the same parties, which

(*w*) 1 Cro. 609. Austyn *v.* Lucas. Mo. 909. 1 R. A. 651. S. C. A similar custom has been declared void, but the terms of it seem obscure, and no reason is given. Gwill. 580. Lister *v.* Foy.

(*x*) Bunb. 73. Dodson *v.* Oliver. It appears, Gwill. 623. S. C. that the bill was filed among other things for tithes of milk; but what fell from the Court relative thereto is not mentioned in that report. Yet Bunbury's Report seems confirmed in another place. Gwill. 826. Carthew *v.* Edwards.

(*y*) Gwill. 1046. Morgan *v.* Neville.

was objected to, but the objection was over-ruled, the same question being at issue in that cause. Several witnesses deposed in support of the custom, whereupon the chief baron declared, that it was not an invariable rule in questions of this nature to refer themselves to a jury; but only where the matter is doubtful, and they take that course in cases both of moduses and customs. He then summed up the evidence for the plaintiff, which appears very satisfactory and convincing in proof of the custom. Another of the barons argued, that the parish having been for the most part under a composition, the produc- [130] tion of many instances of the custom could not be expected; that there is a great difference between a bill for subtraction of tithes, and a bill to establish a custom; a farmer will not set out his tithe in a way that is burthensome to himself, without a custom. Accordingly, the plaintiff prevailed in obtaining a decree for an account of those tithes without the hazard and inconvenience of referring the existence of the custom to a jury.

It may be recollected from what has been stated, that this species of mixt tithes is required to be set out by the common law, as it is enforced by the (*z*) statute of Edward VI. in regard to all tithes of the predial kind. The common law method then of tithing milk is thus laid down: (*a*) "That if there is no particular custom or usage, the "parishioner is obliged *de jure* to pay *every tenth meal*; "to milk the cows at the usual place of milking into his "own pails, and the parson is obliged to fetch it away "from the milking-place in his own pails in a reasonable "time; and if he does not fetch it away before the next "milking-time, the parishioner may justify the pouring of "the milk upon the ground, because he *then* has occasion

(*z*) 2 and 3 E. VI. c. 13. (*a*) Bunb. 73. Dodson *v.* Oliver.

" for his own pails" (*b*). And it was alleged to have been determined by the whole court, that the milk ought not to be carried either to the church porch, or to the parson's house, but that it ought to be fetched by the parson. On this last point, as on other branches of tithe law, much uncertainty and fluctuation of opinion have formerly prevailed among the judges of the superior courts. In (*c*) a [131] cause where no custom was insisted on by either side, although slightly mentioned in the bill, the barons of the exchequer being divided in opinion upon the question, after long deliberation, and much argument by civilians and common lawyers, finally decreed that the defendant for the future should bring or send his tithe milk to the church porch, to the end that the plaintiff, or his agent, or servant, might receive the same without cost. Several years after this solemn decision, we find (*d*) the judges of the common pleas declaring that of common right tithe of milk is payable at the parsonage, or vicarage house. Yet notwithstanding these authorities, the law seems now clearly settled otherwise. To this effect is a case (*e*) of later date than the two cases just cited, where the answer stated, that the plaintiff, the rector, having declared he would not send for, or fetch the tithe

(*b*) See Hutchins *v.* Full, Gwill. 1202.

(*c*) Gwill. 527. Dodd *v.* Ingleton. The bill stated that the defendant under the colour of *some words* in a decretal order in a former cause between himself as plaintiff, and other persons inhabitants of the same parish defendants the now defendant had not *sent, or carried the same every tenth day or meal, as he ought to have done, according to the custom of the parish.* These words were " that the defendant shall pay to the plaintiff " tithe milk in kind all the year " round, the said plaintiff or his " tithe gatherer making a demand " of the same *at the respective ha-* " *bitations of the said defendants.*"

(*d*) 1 Lord Raym. 129. Scoles *v.* Lowther.

(*e*) Gwill. 826. Carthew *v.* Edwards.

milk, the defendant ordered every tenth meal of his cows to be turned upon the ground, it not being usual or customary for the parishioners of that parish to carry their tithe milk home to the rector, and the court, on the authority (*f*) of a determination above referred to, declared that the defendant ought to have milked the tenth meal of his cows in vessels of his own at the place, and in the manner he milked the other nine meals; and that the plaintiff ought to have fetched it away in his own vessels. And in a judicial argument on a still more recent [132] occasion, the chief baron cites, and seems to give his sanction to a prior adjudication, (*g*) according to which it was holden, that of common right, and without a custom, the vicar ought to fetch the tithe milk.

This mode of determining the tithe of milk, namely, by the tenth meal, appears to be established by a series of authorities, in (*h*) one of which it is added, that "in all cases where you do not make out some custom, you must pay according to the canon." And the meaning (*i*) has been in a decretal order studiously explained to prevent possibility of doubt, in the following words; "The defendant's whole tenth meal's milk every tenth morning, "and his whole tenths meal's milk every *tenth* evening." Yet the same subject afterwards underwent much discussion in (*j*) a cause comprising various matters; but in which the manner of tithing milk was considered as the

(*f*) Bunb. 73, Dodson *v.* Oliver.

(*g*) Bedle *v.* Miller, cited in Erskine *v.* Ruffle. Gwill. 969, 970.

(*h*) Bunb. 20. Gwill. 618. Bate *v.* Sprakling. The defendant had set out the tenth of each meal which was clearly wrong, therefore, he was decreed to account. Gwill. 1114.

(*i*) Gwill. 529. in Dodd *v.* Ingleton. See Gwill. 1112, 3, 4. 1118. T. Raym. 277. S. C.

(*j*) Gwill. 1101—1120. Bosworth *v.* Limbrick.

principal, and most interesting question. The defendants, the parishioners, professed to have duly set out to the plaintiff, the rector, for his tithe, *every fifth evening meal*, which they said was the tenth meal, to which the parson was entitled. The plaintiff on the other hand, contended, that the tenth meal's milk properly included the two successive meals of the tenth day, and of that opinion was the [133] court of exchequer; and after citing (*k*) numerous cases on the subject (*l*) accordingly declared the plaintiff entitled to the tenth morning's meal of milk, and the tenth evening's meal of milk, and ordered the defendant to account for the same with costs. From this part of the decree there was an appeal to the house of Lords, where, among the printed reasons on the part of the appellants, it was urged, that the mode of tithing established by such decree in giving to the respondent the whole meal of every tenth morning, and every tenth evening, was giving him, instead of the tenth meal, the nineteenth and twentieth meals, between which there was no more connection than between the first and twentieth, and that to deprive the farmers of the whole milk every tenth day, would subject them to great hardship, and inconvenience. Among the reasons, on the other side, the suggestion of inconvenience was sifted in detail, and such detriment shewn to be inconsiderable, though that ought not to outweigh the justice of the case; that the tenth meal, and the tenth day have been, and ought to be considered as expressive of one and the same idea; and the tenth of the morning's milkings and the tenth of the evening's milkings have conjunctly

(*k*) But not what is said respecting tithe-milk in Scoles *v.* Lowther, Ld. Raym. 129, nor this part of Erskine *v.* Ruffle. Gwill. 961.

(*l*) Premising, however, that it was by accident it happened to be the whole milk of the day, namely, if the cows had been begun to be milked in the evening, instead of the morning, then the tithe milk would have been due in the even-

been considered as the tenth meal; in confirmation of which proposition, stress was laid on the expressions of the decretal order in another cause above quoted; that the produce of an evening's milking was, on an average throughout the year, at least one-third less than that of a morning; what therefore had been done by the appellants was no more than setting out (*m*) a part for [134] the whole, which was void; as a prescription to pay less than a tenth is a void prescription. The case was argued at the bar of the house in the presence of several learned lords, who then filled, or had filled, the highest judicial stations, when, without any debate or division, it was ordered and adjudged that "the appeal be dismissed, and the decree complained of affirmed," without taking any notice of the costs of appeal. Thus the legal sense of the *tenth meal* of milk is finally ascertained, and established. But as it was (*n*) remarked, on this occasion, by the court appealed from, there exist scarcely any modes of taking tithes in kind wholly free from the probability of mutual inconvenience, which may suggest mutual accommodation, and lead to the settlement of a reasonable composition between the parson, and the farmer.

It is observable, that the printed reasons of the appellants and respondent concur in this respect, that when the tenth meal was originally declared to be the right of the parson, it was substituted in the room of the tenth quart, or the tenth dish, or the tenth part of each meal, which was before supposed to be the thing really due, and that such tenth meal was introduced in favour of the clergy, and to remedy the inconvenience, which they sustained in being obliged to send for, and take away the produce of so numerous tith-

ing, and in the morning of the succeeding day. Gwill. 1115.

(*m*) Bunb. 307. Gwill. 711.

Brincklow *v.* Edmunds.

(*n*) Gwill. 1114.

ings. And yet, notwithstanding this coincidence of opinion in those who penned these statements in other respects adverse, in a (*o*) judicial argument, which I have more than once referred to, the doctrine, that tithe of milk is due the tenth day, is traced back to the (*p*) Anglo-Saxon laws, and [135] it is added, that the tenth meal of milk is due of common right, and that this certainly is the most equal rule of tithing milk, though at some times the parson will have the advantage, and at other times the parishioner. How then is it the most equal rule? Tithing it by measure is subject to no occasional disparities, and perhaps the (*q*) alleged inconvenience of that mode is magnified in supposition beyond the reality, otherwise it would hardly have been established, and continued as the (*r*) incontestible law throughout the long civilized realm of ancient France. But with us, undoubtedly, the tenth meal, as above interpreted, is the settled criterion of the tithe of milk. And where in a subsequent case, a custom of setting out the tenth meal of the milk of each of the cows kept by the defendants, as such cows came to the pail, or first came in

(*o*) Gwill. 969. in Erskine *v.* Ruffle.

(*p*) "*Et qui caseum fecerit, det* "*Deo decimum, si vero non fecerit,* "*lac decimo die.*" A. P. LL. Edw. Conf. quas. Guil. Bastard confirm. Wilk. LL. Anglo Sax. 198.

(*q*) The tenth meal is said to have been established by reason of the trouble, which would otherwise accrue in collecting so small parcels. 2 Danv. Abr. 596.

(*r*) And tithe-milk could not be made into cheese without the consent as it seems, tacit or express, of the parish priest entitled thereto. "*De lacte idem videtur ut ex de-* "*cem pintis una debeatur, tamen* "*si fiant de voluntate curati ex-* "*pressa vel tacita, casei, decimus* "*præstabitur curato quod est ma-* "*gis frequens. Et idem in butyro* "*ut etiam decima debeatur, &c.*" Rebuffi Trac. de Dæcimis, Quæst. VI. § 33. These tracts of Rebuffus are extremely scarce; the copy I consulted belongs to the Royal College of Physicians. "*Pintis,*" I suppose, means English quarts. Du Cange, Glos. v. Pinta says "*Nostris Pinte*" which is an English quart.

milk, and the tenth meal together of all such cows as happened to come in milk on the same day, was strenuously insisted upon, the court of exchequer decreed an account with costs, and on an appeal to the House of Lords the decree was affirmed, with one hundred pounds costs (*s*).

IX. Another tithable matter belonging to the class of mixt tithes is the article of *wool;* this subject hath been before touched on under the head of agistment, *supra*, 86, *et seq.*

Tithe (*t*) of wool is due of common right, at the time when it is clipped; but by prescription it may be set out the whole together at another time; and if the spiritual court will not allow such prescription, that jurisdiction shall be restrained by prohibition from proceeding [136] in the cause. Tithes (*u*) are due for all fleece-wool; but locks of wool seem to be not tithable; indeed, in the case referred to, a custom was alleged to discharge the latter: A like prescription (*v*) to pay the tenth fleece in satisfaction of all locks and tithes of wool, has been declared to be good in substance: And in another book, (*w*) it is said that such prescription ought to be of locks of wool casually lost. Yet it appears from other (*x*) authorities, as if locks of wool not being more than ordinary, and where no fraud is used, are exempted from tithes by the general rule of the common law, without the aid of any custom or

(*s*) Hutchins *v.* Full, Gwill. 1200.

(*t*) Wats. C. L. 566. Mo. 910. 2 Cro. 702. Gwill. 215. Green *v.* Hun.

(*u*) Gwill. 579. Lister *v.* Foy.

(*v*) 1 Cro. 363. Jesop *v.* Payne.

(*w*) Mo. 911. Anon.

(*x*) 2 Inst. 652. God. Rep. Can. 462. Wood, Inst. l. Engl. 173.

prescription; and (*y*) if the parishioners without fraud, before shearing time, cut off the dirty locks called the birling of sheep, of this no tithe shall be paid; according to two cases, in one of which, however, it was surmised, as a consideration for the exemption, that the party claiming it wound up the tithe-fleeces for the parson. So if a (*z*) man shears his sheep round their necks about Michaelmas, to preserve them and their fleeces from brambles, and not for the benefit of the wool so clipped, but fairly and without covin, no tithe is due for such clippings, or neckings; though here too, according to (*a*) another report of what appears to be the same case, it was judged necessary to support the discharge by a suggestion, that the parishioners used to wind up the other fleeces at their own charge.

[137] If (*b*) sheep die of the rot, or other disease, or if the owner kills them for domestic consumption, or sale, still tithe is due; not indeed of the skins, not being of annual renewal; but for the wool of such sheep: though (*c*) if they die after being shorn, and before the Easter following, it is said the wool is not tithable, unless the parson can prescribe to have it. But tithes are payable for sheep brought in after shearing, and wintered and sold, or killed unshorn (*d*).

Wool (*e*) of lambs is tithable, though tithe has been

(*y*) 1 R. A. 646. Degge, p. ii. c. 6.

(*z*) 1 R. A. 645. Degge, p. ii. c. 6.

(*a*) Bul. 242, 3. Foss *v.* Parker, called in R. A. Joyse *v.* Parker, B. R. M. 14 J. 1.

(*b*) Degge, p. ii. c. 6. 1 R. A. 646. See Latch. 254. Anon. but see Cecill *v.* Scott, Littl. 31.

(*c*) Wats. C. L. 567. F. N. B. 118.

(*d*) Smith *v.* Johnson, Gwill. 606.

(*e*) 1 R. A. 642. Wats. C. L. 566. Bunb. 90. Gwill. 629. Baker *v.* Sweet, 3 Burn, Eccl. 1.

rendered of lambs in their wool two months only before, for it is a new increase (*f*). And as Burn remarks, where a modus is paid for a tithe lamb, and the other nine lambs are shorn, tithes shall be paid of their wool, those of wool and lambs being different species of tithes, and consequently a modus for lambs being no satisfaction for the tithe of wool.

It is laid down by (*g*) Degge, who extracts the doctrine from (*h*) Lyndwood, that if the sheep of several proprietors depasture together in one flock, or under one shepherd, yet this shall be no reason for their being tithed together, for every owner shall pay tithe of his individual sheep separately; but if the head of a family keeps his flock mixt with the sheep of his children, "*in potestate* "*patris existentes,—tunc de talibus debet solvi decima* "*tanquam de bonis ipsius patris.*" This latter case seems to be merely that of a father acting under the authority of natural guardian to his children.

Some (*i*) writers assert that the tithe of wool is [138] to be paid to the tithe-owner proportionally for the time that the sheep are in the parish, as, that he shall have eight pounds of wool in eighty, of forty sheep, in the parish a whole year; four pounds of wool, if they were there only half the year; two pounds if they were there only three months; and a tenth of a twelfth part of the wool, if they lay and fed a single month in the parish: for (*j*) no space of time less than thirty days successively, and not

474. Gwill. 826. Carthew *v.* Edwards.

(*f*) Ibid.

(*g*) P. ii. c. 6.

(*h*) Prov. 193.

(*i*) God. Rep. Can. 462. Wats. C. L. 566.

(*j*) Lynd. 198. Degge, p. ii. c. 6.

by intermission, is to be taken into the computation for this division of tithes between different rectors. But (*k*) Burn on the contrary states, that it is now clearly holden that the tithe both of wool and lambs shall be paid where the sheep are shorn, and where the lambs fall, that is, provided they be removed thither without fraud, and there be no equitable claim to any part of the tithes in the parish from whence they came: That these tithes are in no wise to be divided, but the whole are to be paid where they lamb, or are shorn, and an agistment tithe for them in every parish where they have been depastured, as being there unprofitable cattle, yielding no other benefit to those tithe-owners; and that no regard is had to the distinction, whether they have, or not, continued for less than a month; for there is the same equity that tithes should be paid for one day as for thirty. But the same author admits, that if the removal of the sheep was unnecessary, and only a little before shearing, or lambing time, this may amount to fraud, and if it appears in that light, tithes shall be paid in the parish, from which they were thus fraudulently removed. All those positions seem to be correct; though contrary to this writer's usual practice, no express authority is cited in their support. He subjoins, [139] however, a case (*l*) relative to the question of fraud where the ewes were kept by the defendant in the parish of A. in which the demand lay, all the year until Christmas, when they were ready to drop their lambs, and then were removed to the defendant's own land in the parish of B. where there was a small modus only for lambs, and there kept till Lady-day for convenience of forage, as insisted on by the defendant, and at Lady-day were brought back to A. Two of the barons of the exchequer at first

(*k*) 3 Eccl. l. 472.

(*l*) Bunb. 139. Gwill. 647. Boys *v.* Ellis. See Lewis *v.* Giffard, Gwill. 1270.

thought it might be proper to send it to an issue to try, whether the transaction was fraudulent or not, and whether this had been the defendant's usual course of husbandry; but afterwards they concurred in holding that there was not sufficient proof of fraud, and in dismissing the bill. This case does not amount to much; but it seems to imply as to lambs, first that they are *primâ facie*, and regularly tithable where they are dropped; and secondly, that if the suggestion of fraud had been satisfactorily evinced, and the removal had not been plausibly accounted for, a right would have accrued contrary to the *primâ facie* right, to the rector of the parish, from which such fraudulent removal was made: And moreover as to wool, notwithstanding the observation of the original reporter, that "the tithe of lambs must be paid where they fall, and is not a divisible thing as wool is," the tithe of the latter being due at the shearing of it, it may be better to adhere throughout to what Burn vouches for the modern doctrine on the subject, as tending to preserve systematical uniformity, and to avoid embarrassments.

On a former occasion, (*supra*, 66,) for the sake of the general principle, I referred to a case, (*m*) shewing [140] that a custom of tithing wool, without the tithe-owner's inspection, was void, from its being unreasonable. If a custom (*n*) is alleged to pay the tenth pound of wool for tithes of wool, without shewing that any thing, and what, is payable for a less quantity than ten pounds; this also is a bad custom, or modus, for as to the quantity under ten pounds it amounts to a *non decimando*, or total exemption from tithe without any substitution, which, as we shall

(*m*) Hob. 107. Gwill. 279. Bunb. 321. Christian *v.* Wrenn. Acc. Wilson *v.* Bishop of Carlisle, (*n*) 1 R. A. 648.

hereafter see, is not allowed by law in regard to articles tithable, as wool is, of common right. In such case, therefore, of less than ten pounds, Wood (*o*) says, a reasonable consideration shall be paid: And he adds, if there are less than ten fleeces, they shall be divided into ten parts, or an allowance otherwise made. But any particulars of the method of tithing wool by fleeces, except as to the parson's general right of inspection, I have not found described, or ascertained in our books. At all events, tithing it by weight seems (*p*) a more exact and juster mode, and being the common way in which (*q*) it is bought and sold, may more readily lead to a pecuniary recompence, or occasional composition in lieu of taking the determinate number of pounds weight in kind.

These are some of the most important points relating to the tithe of wool.

X. I now proceed to the consideration of the tithes of *young animals,* namely, *lambs, calves, kids, colts,* and *pigs,* being also of the class of mixt tithes.

(*o*) Inst. l. Engl. 167.

(*p*) It may, therefore, be thought extraordinary, that the same laws of ancient France, which ordain the equal mode of tithing milk by measure, prescribe on the other hand the tithing of wool by the fleece. "*De Lanâ statim detonsâ* "*solvi et exigi solet ex decem vel-* "*leribus unum, pro decimâ,*" &c. Rebuff. tractat. de decimis. Q. vi. § 32. And see Fletcher *v.* Wilkinson, Gwill. 675. in which case on motion for a prohibition, a custom was suggested for paying the tenth pound of wool and not the tenth fleece, and the court held it to be no modus, but only a different way of paying tithes in kind, and denied the motion.

(*q*) Anno 1390. Wool on account of a law against the exportation of it was sold for 3*s.* for 2*s.* and even for 20*d.* a stone. Parl. Hist. Vol. I. at the end. This may serve to shew the validity or invalidity of wool moduses, as far as it depends on comparative valuation. See Gwill. 1058. Bedford *v.* Sambell.

The (*r*) time of tithing *lambs* is when they are fit to live without their dams, and can thrive on such food as the dam lives on, and when the occupier weans his own lambs, and not before. Several (*s*) attempts have been made to fix by custom a particular day for tithing lambs, as on the feast of St. Mark, and on the first day of May. In (*t*) one case, the court allowed, that such lambs as were able to subsist without the ewes on St. Mark's-day, were to be tithed; but that such other lambs as were not then able, were to be tithed when they were able to subsist without the ewes. In (*u*) another case, it was referred to three neighbouring justices of the peace to enquire what was a fit time for setting forth tithe lambs in that country, who certified the first of August in their judgment to be a proper time, and the court approved of it. On (*v*) other occasions the court hath simply, and generally declared a custom of tithing lambs on St. Mark's- [142] day unreasonable, and void. But in the latest (*w*) case I have met with where such custom was insisted on, the Court, though it appeared to them unreasonable, still held, that it ought to go to a jury; and if facts were proved on the trial, which shewed, that in the country where the question arose the custom was unreasonable, the jury ought to find against it; for reasonableness, as well as usage, is necessary to establish a custom.

(*r*) Turner *v.* Weedon, Gwill. 524. Gwill. 530. Croft *v.* Blake, 3 Burn, Eccl. l. 468. Gwill. 630. Croft's case.

(*s*) Ibid. and Gwill. 579. Lister *v.* Foy, 3 Burn, Eccl. l. 469. Gwill. 630. Heaton *v.* Regal, Bunb. 133. Reignolds *v.* Vincent, Gwill. 1058. Bedford *v.* Sambell.

(*t*) Gwill. 579.

(*u*) 3 Burn, Eccl. l. 469. Gwill. 630.

(*v*) Croft *v.* Blake, Gwill. 530. 3 Burn, Eccl. l. 469. Gwill. 630. Bunb. 133.

(*w*) Gwill. 1058.

A (*x*) custom that where the parishioner has ten lambs, the tenth (*y*) is due to the rector on St. Mark's-day; if nine, the rector to have one, and pay the parishioner a halfpenny; if eight, to have one, and pay the parishioner a penny; and when seven lambs, the rector to have one, and pay the parishioner one penny halfpenny; and that for a less number the rector is to have no lamb, but is only to have a halfpenny paid him for each lamb under seven, has been established as a good custom, notwithstanding it was objected, that by the case of *Reignolds against Vincent*, a payment on St. Mark's-day was adjudged void; but (*z*) the original reporter remarks, it was proved in this cause, that the parson had a benefit, for when there were ten lambs, after the parishioner had taken two, the rector was to choose his one. Burn observes (*a*) that custom has established in most places, that the parson shall have half the value of a lamb, if there are five lambs; an entire lamb if there are six; and shall receive or pay pro- [143] portionally for the numbers under five or above six; but the generality at least of such custom, so far as it relates to the parson's having a lamb in kind out of any number under ten, seems contradicted by a (*b*) case in the exchequer, in which it was decreed, that where there are above or under ten calves, lambs, pigs, and the like, the

(*x*) Bunb. 307. Gwill. 711. Brinklow *v.* Edmunds.

(*y*) Bunb. 133. One of the cases just cited, in which a custom of tithing lambs on St. Mark's-day was adjudged bad by the court.

(*z*) Bunb. 308.

(*a*) 3 Eccl. l. 444, 5. 471. It stands there "under five and *above* six," but the rector's largest payment would be *at* six. See Gibb *v.* Goodman, Bunb. 328. Gwill. 735.

(*b*) Bunb. 198. Gwill. 661. Egerton *v.* Still. Degge, p. ii. c. 6. 251. 2 R. A. 308. See Latch. 254. Anon. The two last books relate to tithing calves, in which the same rule prevails of denying the parson this election.

tithe of the odd number above or under ten, shall be paid according to the value, and not be carried over to the next year. It may be presumed by the last expressions, that the canon was in contemplation, which gives the rector his election, either to receive a pecuniary payment for the odd number, or to let his tithe run on till a lamb or a calf should be due in the ensuing year. The common law refuses him such power of election, because tithes must be paid annually: where, however, there is an odd number of lambs, the tithe of which is to be accounted for, and no express modus particularly specifies the sums to be paid, I suppose they must be regulated according to the present value of money. For if there (*c*) exist a *prescriptive usage, or modus of paying a halfpenny for every lamb sold before May-day without any other tithe for them,* and the parishioner one day only before May sells all his lambs, this appears to be construed fraudulent, as an undue and immoderate abuse of the custom, and he shall not be discharged by such custom from paying the value of the tithe. Some doubt may, however, be entertained of the soundness of this last doctrine; but the mention of it marks at least *the distinction between prescriptive payments, and what is meant by the value, or modern prices of articles on sale.*

It is obvious, that what has been said of lambs is [144] generally applicable to the other young animals enumerated. Thus, (*d*) a single *calf* hath been adjudged tithable, and the defendants seeking to oblige the vicar to accept a shoulder of each calf in lieu of his demand, without the warrant of any custom for that purpose, the court, upon debate of the matter, was of opinion, that *the*

(*c*) 1 R. A. 652. Wood Inst. 1. Engl. 169.

(*d*) Gwill. 541. Kenyon *v.* West.

tenth part of the value of the calf, when taken from the cow, to be sold or killed, ought to be paid for the tithe of it; which (*e*) value in case of sale is it seems to be ascertained by the actual price.

A prescription to pay a certain sum of money for five cows having calves, another sum for six cows having calves, another sum for ten cows having calves, in satisfaction of all the tithes of cows and calves, was adjudged void, because it alleged no payment for any intermediate number of cows between six and ten, or when the number exceeded ten. (*f*) So a modus of 6*s*. 8*d*. for one calf in ten without saying, and so in proportion if there be a less number than ten, was held bad. (*g*)

Colts (*h*) are tithable in the same manner as calves, and so are kids (*i*).

As to (*k*) pigs, such custom was established as a good local custom in regard to them, as I have before mentioned to have been established respecting lambs, where a parishioner has ten, and regulating the sums to be respectively paid, or received when they fall short of that number. The court (*l*) hath also ordered a defendant to pay a modus, or certain yearly sum of twenty-pence, for every sow that had pigs, which are at any time kept by the plaintiff in the vicar's parish, although such sows farrowed in another parish; but this was in a case be-

(*e*) 1 R. A. 648.

(*f*) Martin *v.* Briggs, 2 Lutw. 1037. Gwill. 561.

(*g*) Gilb. *v.* Goodman, Bunb. 328. Gwill. 735.

(*h*) Gibs. 678. Wood Inst. l. Engl. 167.

(*i*) Wood, 169.

(*k*) Bunb. 307. Gwill. 711. Brinklow *v.* Edmunds.

(*l*) Gwill. 607. Wright *v.* Elderton.

fore noted as requiring explanation, and not so fully and particularly stated as to be easily understood. (*supra*, 127.)

A custom, that every occupier of lands within the parish having any pigs farrowed within the same to the number of seven and upwards, and not exceeding ten in number, shall pay to the tithe-owner one of such pigs in lieu of such number of pigs for that year, and that such occupier shall not render any satisfaction in respect to the tithes of pigs being under seven in number in any one year was held good; though it was objected, that this was an uncertain recompence for a certain duty, for that if the number of pigs was under seven it gave nothing; if above the number of seven and not exceeding ten, it gave one; whether therefore the parson was to have any thing at all was altogether contingent: that both by the common law and canon law the parson is in such a case entitled to a rate-tithe, the canon law giving a money payment for any number under six, and for all above that number and under ten giving him one, he returning to the parishioner a proportionate sum for the number it may fall short of ten; that the common law gives a money payment for any number under ten: but the court observed, that the objection to this modus would have been strong had the subject been divisible, but as the case stood there was nothing in reason against it, for it would be beneficial to the parson the animal being very prolific. (*m*)

Lastly, as to these young animals in general, it is [145] (*n*) held, that the regular period of tithing them all, is

(*m*) Mantell *v.* Paine, Gwill. 1504.

(*n*) Degge, p. ii. c. 6. Wats. C. L. 565. cap. 50. See Jacob's Law Dict. Tithes, Calves.

when they are so old that they may be weaned, and live without the dam, unless the custom of the place confine the payment to any certain time, or age. Such custom, however, must not be unreasonable; and in respect to the observation of the court in two cases before referred to, as to what is the proper time, it is, when the owner weans his own lambs; Burn (*o*) explains, and justifies the mutual fairness of it, by saying, "it is not supposable, that the "owner will wean his lambs sooner, or keep them with "the ewes longer than they are fit to be weaned, the "former being a prejudice to the lamb, and the latter to "the ewe."

XI. The next tithable articles of the mixt kind to be noticed are the *young of poultry, and tame fowls.*

All (*p*) tame and domestic fowls, as hens, (*q*) geese, and ducks, are subject to the payment of tithes, either by the tenth of their young, or of their eggs; but not of both, for where the young are tithed, the eggs shall not be so too, nor *è converso;* and whether the payment shall be satisfied out of the number of the young, or the number of the eggs, depends upon the custom of each place in particular. Swans (*r*) are for this purpose enumerated among tame fowls, and as tithable by the common law, and no controversy appears on the subject. But with regard to turkeys mentioned as tithable by the same writer, a doubt (*s*) has been entertained, whether they did not fall [146] under the description of such birds as are *feræ*

(*o*) 3 Eccl. l. 442.

(*p*) Degge, p. ii. c. 2. Wats. C. L. 457.

(*q*) According to Lynd. 193. note (*u*) "*est enim lana ovina, ut* "*hic item leporina, anserina, et ca-* "*prina.*" Tithes of the quills and feathers of geese would in some parts be of considerable value.

(*r*) Ibid.

(*s*) Wood, Inst. L. Eng. 172. Mo. 599. Hugton *v.* Prince. Wats. C. L. 457.

naturæ, which would exempt them from tithes without a special custom rendering them liable. This matter, however, is now settled; for in a (*t*) cause in chancery in which tithes of them were demanded, the Master of the Rolls declared, that he could not see but that turkeys were birds as tame as hens, or other poultry, and therefore, must pay tithes; but he admitted, that if tithes were once paid of the eggs, there could be no demand made a second time in respect of the chickens hatched afterwards. And in another (*u*) suit in the exchequer it was adjudged, that no modus could extend to turkeys, because they are in respect to time of modern introduction into England; but as to birds really and essentially *feræ naturæ*, as (*v*) pheasants, (see *supra*, 95,) and partridges, if a man keeps them for breeding in an enclosed spot, and clips their wings, still they shall pay no tithes, though in one case they are expressly termed *tame* pheasants and partridges; while in another, they are said *not to be reclaimed*, and that they would fly away if their wings were not clipped; the point seems to have been decided on their originally wild and roving disposition. For the same reason tithes are not payable for a decoy of wild ducks, or for ducks of that description, or other wild fowl taken in a decoy (*w*).

XII. The last species of tithable objects falling under the denomination of mixt tithes are *eggs*. In respect to which it is to be observed, that three (*x*) eggs for every cock, and drake payable on Wednesday before Easter,

(*t*) 2 Wms. 462. Gwill. 676. Carleton *v.* Brightwell.

(*u*) Bunb. 307. Gwill. 711. Brincklow *v.* Edmunds.

(*v*) Mo. 599. Hugton *v.* Prince. 1 R. A. 636. Wats. C. L. 457. See Degge, p. ii. c. 8.

(*w*) Camell *v.* Ward. Gwill. 531.

(*x*) Bunb. 307. Gwill. 711. Brincklow *v.* Edmunds.

and for every hen, and duck respectively, three eggs, in lieu of tithe eggs, and chickens, and ducks hatched in the parish, has been established a good modus, or custom (*y*). [147] It hath also been adjudged to be a good modus to pay thirty eggs in Lent for all tithes of eggs. To the latter of these Gibson (*z*) objects, that it seems inconsistent with the principle of law that every modus ought to be somewhat, as to kind, different from the thing which is due; (*infra*, 199,) but lord chief justice Holt (*a*) vindicated the determination by observing, that the custom binds the parishioner to the payment of so many eggs at that time, and whether he have hens, or not, he is obliged to make it; so that he may be forced to buy eggs to pay the parson, and that makes it a good custom; but if the custom were, that he should pay thirty eggs of his own hens, it would be invalid. Eggs of tame ducks kept for the service of a decoy of wild fowl are not tithable, without proof of a custom for their being so (*b*).

As to *personal* tithes, they are shewn in the last chapter to consist, chiefly at least, of mills, and fish; the general manner of tithing which was there mentioned, to be by the tenth part of the clear profits, after a deduction of the expences.

(*y*) 1 R. A. 648.
(*z*) Cod. 679.
(*a*) Ld. Raym. 360, in Hill *v.* Vaux.
(*b*) Camell *v.* Ward. Gwill. 531.

CHAPTER V.

Tithings Tithable by special Custom.

CUSTOM, in the sense in which it is applicable to every legal subject, must be alleged and proved to be circumscribed within certain local boundaries, as most frequently with reference to the present subject within the parish in question, and its vicinage. For (*a*) if it be a general custom of England, it is common law. But particular customs differing from the general custom of the realm, must it seems have been co-eval with the general custom, and, therefore, are to be considered not as controlling the general custom before established, but as the custom established in that place in which the general custom had never any existence. Custom and prescription, though confounded in common language, are, strictly speaking, very distinct in their nature: it is true that immemorial usage is essential to them both; but prescription is not co-existent with the general custom, but is derogatory to the general custom which antecedently prevailed, and was in its origin founded on a grant which is now evidenced by immemorial usage; consequently no claim by prescription can be maintained, but such as might have been the subject of a legal grant; but it is otherwise in respect to custom (*b*); as for example, some customs prevail for the encouragement of marriage, some of habitation.

(*a*) Degge, p. ii. c. 13 (*b*) Bennett v. Read, Gwill. 1272.

There is this important difference to the rector between things tithable of common right, and those tithable by custom only, that in demanding the former his title rests on the common intendment in his favour, and it is incumbent on the adverse party to discharge himself as he can: Whereas, (*c*) he who sets up a claim to tithes of articles not tithable in their nature, but by custom merely, assumes the burthen of establishing such claim by competent proof. I shall, therefore, embrace this opportunity of briefly observing on the evidence addacible for such proposed end.

Not (*d*) only actual payment of the controverted articles in kind, but written, or other testimony of a temporary composition in lieu of it, may avail to substantiate the right; for the existence of such composition shews, that tithes in kind must have been due. It seems also, [149] that (*e*) books of account, memorandums, or entries of any of the present incumbent's predecessors in the benefice, specifying what has been received in a certain year or years for particular tithes, will be received in evidence on his behalf. The (*f*) books likewise of a lessee of an impropriate rectory, stating receipts for tithes, are admissible for the impropriator after the expiration of such lessee's interest. For there could be no greater influence on the lessee's mind to fabricate untrue entries than on that of a spiritual rector or vicar, since

(*c*) See Gwill. 840. in Walton *v.* Tryon. But a defendant in equity setting up a modus (which is a sort of partial discharge) must be plaintiff at law, because the issue is upon him. 2 Ves. 516. Gwill. 859. Chapman *v.* Smith.

(*d*) Ibid. Vin. Abr. t. Evidence T. 6. 117. pl. 3, and 4. Gwill. 620. Gregory *v.* Lutterell.

(*e*) Vin. and Gwill. ibid. Ld. Arundell's case. Gwill. 529. Le Gross *v.* Levemoor, and infra, 272.

(*f*) Gwill. 1617, 8. Illingworth *v.* Leigh.

what he might insert would not be evidence during the term, either for himself, or his assignee. On the other hand, in (*g*) a suit by a lay impropriator, the defendant's books, in which were entries of his father's deceased steward of payment of a modus to the vicar, were received in evidence against the plaintiff to disprove his right to the great tithes of certain pastures; but if the steward had been living, he must have been examined personally on interrogatories, and the written documents could not have been read. (*infra*, 288.) The testimony of a (*h*) witness *interested* in the event of the suit, although not a party, as in support of an exemption by a custom, stated as co-extensive with the district of which he is an inhabitant paying tithes, is of course rejected. The rule (*i*) of evidence in courts of equity ought to be as analogous as possible to that in courts of law. But in the former, where interrogatories are drawn out in writing, and the answers taken by the proper officer, or by commissioners; it is impossible for the party to know what the witness will say; consequently, he is not concluded, when the witness in the course of the cross-examination appears to be interested; nor is the witness rendered competent by such cross-examination being proceeded in, there being no [150] opportunity to the party of interposing, and of urging the objection till after the depositions are published, and the evidence produced to be read in court. Then if the party take the first opportunity that offers by urging the objection to the competency of the witness at the hearing before the evidence is read, such objection, if well-grounded, ought to prevail.

(*g*) Bunb. 180. Gwill. 653. Clanrickard *v.* Lady Denton. Woodnoth *v.* Lord Cobham.

(*h*) Gwill. 361. in Earl of

(*i*) Gwill. 1255, 6. in Scott *v.* Fenwick.

Tradition (*j*) from ancient persons deceased is proper evidence in cases of custom and usage, the principal and general matter of enquiry in tithe causes; but as an observation more immediately affecting the topic from which I may be thought to have digressed, it is (*k*) not allowable to give in evidence, in order to prove a parochial usage, the custom of the neighbouring country, or of any parish other than that in question.

Things not tithable by the general law, but liable to become so by particular custom (*l*), are, exclusively of the personal tithes before-mentioned, chiefly, if not entirely, reducible to three heads; 1. houses; 2. things of the substance of the earth; and, 3. animals *feræ naturæ*.

1. *Houses* (*m*) for habitation, or the rents reserved on the demise of them, are not any more than rents on the demise of lands tithable of common right: for tithes ought to be paid of things which grow, and renew from year to year by the act of God. But houses in London, as will be seen hereafter, (*infra*, 229, 238.) pay an annual pound-rate in the [151] name of tithes, by virtue of an arbitration or decree confirmed by act of parliament. And it is said, that every ancient city or borough has for the most part such custom *de modo decimandi* for the maintenance of their parson. There seems, at least, no doubt, that such customary payments may be demanded, and prevail upon due proof of them without the precincts of London, being insisted on either as the usage of the place, or in respect of particular

(*j*) 2 Ves. 512. Gwill. 854. in Chapman *v.* Smith.

(*k*) Gwill. 965. Erskine *v.* Ruffle.

(*l*) See Bennett *v.* Read, Gwill. 1272.

(*m*) 11 Co. 15. 6. a. Gwill. 259. Dr. Grant's case. Hob. 10. Gwill. 261. 263. Whittaker and Tiddersal *v.* Leyfield, or Leifield *v.* Tysdale.

houses; since it might have had a lawful commencement, as a modus for all the tithes of the land before the houses were built upon it, and it is unreasonable that the modus should be discharged by the building of the houses. Accordingly, where (*n*) a bill was filed for tithes of houses not within the city of London, claimed as the only provision subsisting for the incumbent of the church in question, it being proved that the houses in the parish had, down from the year 1653, which was near seventy years before the suit, generally paid twelve shillings annually, though no proof was made that the defendant's house had paid for twenty-five years, but by a single witness, yet the court decreed an account without directing an issue; but as to what is stated in this case, that the plaintiff did not allege this payment to be either by custom or pre-cription, and his then giving evidence of payments generally made for a long course of years, the report is in that respect not easily intelligible. So where the plaintiff seised in fee of the rectory impropriate of the parish of St. Botolph without Aldgate, in the county of Middlesex, claimed twenty shillings a year from the defendant, payable by custom, in lieu of tithes of a house in East Smithfield, within that part of the parish which was in Middlesex, on proof of the custom, such payment was decreed with costs (*o*).

2. Of common right tithes (*p*) are not payable of any thing that is *of the substance of the earth,* as quarries of stone, turf, tin, lead, brick, tile, lime, marl, coals, chalk, potearth, and the like; because (*q*) part of the inheritance, and not of annual renewal, or increase. But

(*n*) Bunb. 102. Gwill. 630. *v.* Topping, Gwill. 893, in not. Pocock *v.* Titmarsh.

(*o*) Kynaston *v.* Hattersley, Gwill. 890. See also Umfreville p. 321.

(*p*) 2 Inst. 651.

(*q*) Dr. and Stud. dial. ii. c. 55.

(*r*) any of these articles it seems may be tithable by custom, as lead in Derbyshire, and tin in Devonshire and Cornwall. So by custom tithes (*s*) may be due of white salt. A limekiln also, which is not tithable of common right, may be rendered so by special custom (*t*); which last article should perhaps be classed among personal tithes, and the tithe of it accordingly rated by the clear gains after deducting the outgoing expences. Slates (*u*) are another species of fossils, which have been resolved not to be generally tithable, but doubtless liable to the operation of usage like the rest. The right, however, in these cases, resting solely on the custom, it is obviously requisite, that the usage should be firmly established, and clearly ascertained in order to support the demand. Therefore, in a (*v*) suit for tithe-ore in Derbyshire, the court declared tithe-ore is not due of common right, but by particular custom only, and ordered a trial to be had at law, whether there was any and what custom in the township within the plaintiff's rectory, for the payment of tithe-ore, directing the judge to indorse on the record how the custom was found on such trial.

3. As to *animals feræ naturæ*, it has (*w*) been thought that the ancient rights of the clergy have suffered diminution, and that formerly tithe was paid of fish, rabbits, and the like, by the general custom of the realm. But [153] it is now agreed that (*x*) deer in a park, or rabbits

(*r*) Degge, p. ii. c. 12, 13.

(*s*) 1 R. A. 642.

(*t*) Ibid.

(*u*) Mo. 908. Lyb *v.* Wats.

(*v*) 2 Vern. 46. Gwill. 535. Buxton *v.* Hutchinson.

(*w*) Gibs. t. xxx. c. 3. where as to the difference of pigeons sold, or consumed in the family of the owner, it is argued, that could not make them more or less *feræ naturæ*. I have before incidentally remarked the distinctions on this subject, c. 3. in speaking of personal tithes, supra, 48.

(*x*) Gwill. 1581. Nicholas *v.* Elliott, 2 Inst. 651.

in an inclosed warren, are not tithable without custom, for they are wild in their nature.

Where (*y*) a suit was instituted for tithes against the occupier of what had formerly been a park, and it was proved, that while it continued such, the shoulder of every deer killed within the same, was paid to the rector of the parish in lieu of the tithe of the park; the land being disparked, was after long debate decreed tithable. No reason is assigned for this adjudication; but I apprehend it to have been so decided, because there were no deer specifically to answer the customary payments. For (*z*) where there was a modus of a buck, and a doe yearly due to the rector in lieu of all the tithes of a park, the greater part of which had been disparked, and only a small residue of it had been kept up and inclosed for deer, sufficient still to answer the modus, if specifically required, the value of a buck and doe yearly was decreed to the rector in lieu of all tithes. It is not easy to reconcile the principles of tithe causes, extracted as these are from the decree-book without the statement of any arguments at the bar, or from the bench. It may, (*a*) however, be inferred not to be sufficient barely to allege, that no tithes have ever been paid for a park without shewing the nature of the special exemption.

In respect to rabbits, it appears (*b*) to have been decided by the court of common pleas, that no tithes were due for those consumed in the parishioner's family, [154] before it was clearly settled, that these animals were not generally tithable of common right. But in the next suc-

(*y*) Gwill. 526. Skinner *v.* Clarke.
Smith.
(*z*) Gwill. 609. Nanton *v.*
(*a*) Ibid. Marg. Peck *v.* Dixon.
(*b*) Lit. 13. Gwill. 427. Anon.

ceeding term it was agreed by the same court, that no tithes were due for rabbits by the general law, and only by the custom of the place. It is, therefore, necessary for the rector affirmatively to prove such custom insisted on in his favour. This then was (*c*) the third issue in a cause before spoken of resting on the rector to support, and which he declined trying, namely, whether by the custom of the parish tithes were due of rabbits; although the Lord Chancellor, in pronouncing his decree, thought, that the payment of a pecuniary composition, of which some proof was made, tended to shew that tithes were there due in kind, of this species of wild animals.

In another (*d*) statement of the same case last cited, the plaintiff's counsel are represented as stating it to be a great question, whether this be a predial, mixt, or personal tithe, adding that customary tithes are generally deemed personal. But if it were requisite to add another epithet to the term "customary," perhaps it would be proper to discriminate according to the nature of the subject matter; and, where tithes are due of things of the substance of the earth, to call them customary predial tithes; and where they are payable of other wild animals, as well as of fish, which are reduced into manual possession by some labour of the parishioner, to denominate these customary personal tithes.

(*c*) Gwill. 840. Walton *v.* Tryon.

(*d*) 3 Burn, Eccl. l. 453, 4.

CHAPTER VI.

Things not Tithable.

TITHES shall not be paid for hounds and the like, because, says (*a*) Degge, they are things only of pleasure. If we trace this doctrine to its source in the authority (*b*) cited by him, we find it indeed argued in the manner of the year-books, " that dogs and cats are " not tithable, for the spiritual law will not allow that " vermin should be tithes, for apes and marmosets are " but vermin, and if I grant to a man *omnia bona et Ca-* " *talla*, dogs do not pass." But the (*c*) court in the same cause considered hounds as kept not for pleasure simply, but for necessary uses, and held, which was the point in debate, that an action lay for taking them. It may then be proper somewhat to qualify the reason, why hounds are not tithable, by treating them as usually and principally kept for pleasure, and amusement. This principle applies to collections of foreign birds, and beasts, in general kept as matters of entertainment, and curiosity, and operates to render them not tithable, independently of the wild nature of most of them.

Subject to this slight species of exception, perhaps, all the matters not tithable by the general law, and never made so in special instances by the allegation and proof of local custom, owe their exemption to one common prin-

(*a*) P. ii. c. 12.
(*b*) Year-b. 12. H. VIII.
(*c*) Ibid. 5. a.

ciple; I mean the encouragement and improvement of [156] husbandry. This is obviously the case of various articles incidentally and distinctly before spoken of, and of which it is not here intended to renew the discussion; for example, after-pasture, agistment, for beasts of the plough, and wood used for ploughbote, and the like, are exempt from the payment of tithes; in regard to all which particulars the farmer is exonerated by the common law, and no local usage, in derogation of it, has, I believe, ever been pretended.

Another article (*d*) falling within the same reasoning and description, is that of headlands, sometimes called meres, balks, and butts in cornfields large enough only for turning the plough, for the hay growing on which no tithes are payable by the general law; such spaces being necessary in the course of husbandry, and being esteemed part of the ploughed land, of which the parson has the tithe. Though as to the statement (*e*) in one of our reporters, that this is the reason of the case in the (*f*) year-books, the subject before the court was not a matter of tithes, (of which there is no mention,) but a custom for turning the plough on the adjacent headlands of another; such custom being alleged in justification of a supposed trespass in so doing.

But the most positive and direct encouragement is given by the statute (*g*) of Edward the sixth, by which it is enacted, that all such barren heath, or waste ground not discharged from the tithes by act of parliament, which

(*d*) 2 Inst. 652. 1 R. A. 646. Lit. R. 13. Gwill. 427. Anon. Bunb. 183. Gwill. 657. Chapman v. Barlow.

(*e*) Lit. R. 3.

(*f*) Year-b. 22. E. IV. 8.

(*g*) 2 and 3 E. VI. c. 13. § 5.

before that time had lain barren, and paid no tithes by reason of the same barrenness, and then were, or there- [157] after should be improved and converted into arable, or meadow ground, should from thenceforth, after the end and term of seven years next after such improvement, pay tithe for the corn and hay growing thereon. The section immediately preceding had provided, that no person should be compelled to pay tithes for any lands discharged therefrom by the laws and statutes of the realm; or by any privilege, prescription, or composition real: so that (*h*) all former legal discharges are preserved. The section immediately following that first above cited, enacts, that if any such barren, waste, or heath ground had before that time been charged with the payment of any tithes, and should be improved, or converted into arable ground, or meadow, that then the owners thereof should, during seven years next following from and after the improvement, pay such kind of tithe as was paid for the same before the said improvement; so that, as Degge (*i*) observes, it appears plainly by the proviso, to have been the intent of the legislature to free the improved lands from the payment of such tithes only as were produced by the improvement, which must be of hay, or corn, and no other.

The terms (*k*) used to denote the subject matters of this act of parliament, about ten years after the passing of it, were thus interpreted in the language of an old reporter, namely, "1. *Barren* ground is understood by the opinion "and judgment of the common law to be that whereof no "profit ariseth, or groweth; and ground, which hath been "stubbed and grubbed, and after beareth either [158]

(*h*) Degge, p. ii. c. 19.
(*i*) Ibid.
(*k*) Bunb. 80. Gwill. 131. n. 2 Inst. 656.

" corn or grass, is not barren: 2. *Waste* ground is un-
" derstood such ground as no man doth challenge as his
" own, or no man can tell to whom it certainly apper-
" taineth, and as lieth uninclosed, and unbounded with
" hedge or ditch; but the ground that lieth inclosed,
" and hedged and ditched in, and the land known is no
" waste ground: 3. *Heath* ground is understood such
" ground as is dispersed, and lieth as common." The distinction between the two last descriptions of land is not very obvious.

The statute in these provisions had a view to the encouragement of the farmer, and the extension of cultivation. Therefore, (*l*) though it contain no express words of discharge during the seven years, by a reasonable construction and intendment, an exemption for that period is implied. This inference is indeed irresistible, when we connect the principal clause with that which declares, that such kind of tithes as was paid before the improvement should continue to be so immediately from the time of such improvement: Hence also it appears, that land (*m*) may be barren within the meaning of this statute, though it yield some fruit, and pay some tithe, as of wool, and lambs. But (*n*) land proper for agriculture, and not *in its nature* barren, shall immediately pay tithe after being converted into a state of tillage. This appears to be fully settled as the criterion, according to a (*o*) late determination, where land, formerly part of a common depastured by cattle, and geese, being inclosed, drained, and [159] converted into tillage without any manure, pro-

(*l*) 2 Inst. 656. Degge, p. ii. c. 19.

(*m*) 2 Inst. 655. See Pelles v. Saunderson, Dy. 170. b. Gwill. 130.

(*n*) 2 Inst. 656.

(*o*) Jones v. Le David, Gwill. 1336.

duced at the first a valuable crop of oats: In that case the court, after the example of Lord Hardwicke C. on a (*p*) preceding occasion, seem to consider the question of the natural barrenness of the soil, as depending upon this other question, what was necessary to the first crop? It is then inferred, that if land will bear a crop of corn without expence in tillage, it must be decisive that this land is not in its nature barren. It was farther argued in giving judgment, that inclosure is essential in some situations to the enjoyment in severalty, without being essential to the fertility; and that draining may be a great improvement, rendering land more productive, which would still have been productive without it: it was not, therefore, because a great expence had been incurred by inclosing and draining land, without more, that such land should be protected by the statute. And the impropriator had a decree for an account of tithes after the suit had been pending seven years, but without costs.

In some (*q*) cases, however, where expences of an extraordinary kind are necessary to obtaining a first crop, as where a large bank was to be thrown down before the plough could go upon the lands in question; or where, from the exposed situation of the ground, no corn could grow there without previously incurring the expence of stone-walls to protect it from the severity of the climate, the husbandman has had the benefit of the statute, these measures being deemed more essential to give fertility to the soil, even than manure.

(*p*) 1 Vez. 115. Gwill. 823. in Stockwell *v.* Terry.

(*q*) Byron *v.* Lamb, cited Gwill. 1338. reported ibid. 1594. Hutchins *v.* Maughan, alluded to ibid. 1338. reported ibid. 1197. where the circumstance of the stone walls is not stated; and it appears the question of barrenness within the statute went to a jury.

On the other hand, it is settled (*r*) by numerous authorities, that land, where wood grew, or which was full of thorns and bushes, after it is stubbed or grubbed, and made meadow, or arable, and sown with corn or grain, shall pay tithe immediately, without deriving any exemption from the statute. For such lands are not in their nature barren, but their being unproductive is attributable to negligence, and ill husbandry; but the case is otherwise, in respect of lands rendered fertile by foldage, and the various industrious means of agriculture, by which the soil is not simply meliorated, but essentially changed. Such was the scope of chief justice Popham's reasoning, with whom the other judges concurred, in the reign of Queen Elizabeth; and such has continued to be the received doctrine as to this point, amid the fluctuation of other tithe questions to the present time; for in the last of the cited cases we find Lord Hardwicke expressing himself to the same effect: "that land, if in its own nature it is fit for "tillage, but by reason of wood, or other accidental cir- "cumstance, it was not turned into tillage before, upon "the taking away of that accidental circumstance, it "shall pay tithes presently, on being turned to tillage; "for the act does not consider the expence, for that you "may, by possibility, be paid, as by the timber, under- "wood, &c. But if afterwards this land will not pro- "duce, unless dunged or chalked, the court has consi- "dered this as evidence of its being barren in its own "nature, and not proper for corn, without additional "[161] improvement." The (*s*) same principle, that the

(*r*) 1 Cro. 475. Gwill. 189. Sherington *v.* Fleetwood. 1 Freem. 335. Gwill. 562. Anon. Gwill. 563. Gee *v.* Pearch, Bunb. 159. Gwill. 649. Beardmore *v.* Gilbert, 1 Vez. 115. Gwill. 823. Stockwell *v.* Terry.

(*s*) Gwill. 714. Doyley *v.* Hornby, 1 Rol. R. 354. 3 Bul. 165. Gwill. 1574. Buck *v.* Witt, Gwill. 1336. Jones *v.* Le David.

expence of the undertaking is no equitable criterion for affording the protection of the statute to the land improved, seems to have prevailed in other cases, two preceding, and the third subsequent to this decision of Lord Hardwicke, that is, provided such expence is not incurred as a necessary means to surmount the sterility of the soil, but in the draining, fencing, or the like improvement of land not naturally barren.

But however uniform the sentiments of judges have been in respect to wood-lands grubbed up and improved, in regard to another description of ground, there appears to have been a difference of opinion, if we may trust the authorities; for according to (*t*) one case, *fens* or marshes, which are drained, are not liable to tithes during seven years; according to two other cases (*u*), they are liable to the immediate payment of them; and (*v*) if land be overflowed with water, and afterwards drained by industry, tithes will be payable immediately, although it had been overflowed from time immemorial. These contradictions are ascribed to the same year, and, as it seems, to the same court; but we need not hesitate in pronouncing, that if the fen or marsh is naturally of a productive quality, tithes are due immediately upon the draining and cultivation. This is confirmed by (*w*) a case in which it was contended, that land lately gained from the Severn [162] sea, at the costs of the occupier, was not tithable within the time limited by the statute: The court, on the contrary, held this land, not being naturally barren, to be

(*t*) Gwill. 130. n.

(*u*) Anon. Moore, 430. Gwill. 166.

(*v*) Cro. Eliz. 475. Gwill. 189. Sherington *v.* Fleetwood.

(*w*) 1 Rol. R. 354. 3 Bull. 165. Gwill. 1574. Buck *v.* Witt, Gwill. 825. in Stockwell *v.* Terry.

within the meaning of the statute. And it was stated, that if a man has a salt marsh, which has used to be overflowed by the sea, and he makes a fence against that element, and lays it down in meadow, tithes shall be paid of it, for the land is not of its own nature barren; barren land, according to the statute, being such as will not produce corn without extraordinary manure.

The (*x*) question, whether land is barren within the meaning and benefit of this act of parliament, has been determined to be triable at common law, and a prohibition was accordingly awarded to the spiritual court. But courts (*y*) of equity, on the facts appearing before them, of which facts they are judges as well as of the result in point of law, have repeatedly decided whether lands were barren, or not, in the sense of the statute, without the intervention of a jury, whose prejudices, as (*z*) Degge on this occasion intimates, are by no means favourable to the rights of the church.

If (*a*) lands were barren heath, or waste ground, at the time of passing the act, and were improved, and enjoyed, or might have enjoyed the benefit of this law, and afterwards relapse into their pristine barrenness, the occupier [163] of such lands cannot claim the benefit of the statute upon a second improvement.

Lastly, it may be remarked, that (*b*) as one clause of the statute requires payment only of the tithes of corn and hay after the seven years; and as another clause pro-

(*x*) 1 Keb. 253. Anon.
(*y*) Gwill. 823. Stockwell *v.* Terry, 1336. Jones *v.* Le David, 1594. Byron *v.* Lamb.
(*z*) P. ii. c. 19.
(*a*) Ibid.
(*b*) Degge, p. ii. c. 19.

vides for the payment of such kind of tithes only as was paid before the improvement, for the seven years next after the improvement, without expressly directing other tithes than those of corn and hay, to be paid *after* the seven years; a discharge might be inferred of all other tithes, except of corn and hay, after the expiration of the seven years. But to this it is answered, that there being several statutes enacted, and received canons in force for the due payment of tithes, and no negative words in the law of Edward the sixth, it shall not, by implication, abrogate, to the prejudice of the church, those prior institutions.

CHAPTER VII.

Exemptions general.

THE discharges from payment of tithes remaining to be discussed depend not on any intrinsic, or essential quality of the articles themselves; but are wholly built on some collateral foundation. Such exemption may be either general in its nature, called a prescription *in non decimando,* or of partial extent only, not operating as a total discharge, but presenting some substitution for tithes in kind, denominated a *modus decimandi;* which latter species of discharge comprehends the doctrine of moduses, and compositions.

Mere (*a*) non-payment of tithes, (*infra,* 280,) although from time immemorial, does not amount to a discharge, without shewing some special ground of exemption. Evidence of length of possession, in such a case, a court can pay no regard to; for the possession must have been unlawful, and, therefore, there must be a decree in favour of the common right. Indeed there have been (*b*) cases where this species of general defence may seem to have prevailed, by frustrating the demand of tithes; but they are attributable to the plaintiff's declining to prosecute

(*a*) 3 Burn, Eccl. 393. Breary *v.* Manby, Gwill. 904. Scott *v.* Airey, Gwill. 1174. Fanshaw *v.* Rutheram; Gwill. 1177.

(*b*) Gwill. 559. 765, 6. Medley *v.* Talmy, and the Mayor, &c. of Warwick *v.* Lucas. See also Stone *v.* Rideout, Bunb. 262. Gwill. 675. and supra, 54.

the contest, from a probable consciousness that legal exemptions really existed in these instances, and would be established in proof. On the other hand, in one case, in which (*c*) a defendant to a suit by impropriators urged, that no small tithes, nor any satisfaction, nor composition for the same, were paid by, or demanded from him, [165] or those under whom he claimed, in respect of the lands in question; and that after so long enjoyment of lands freed and discharged from small tithes, a legal discharge was to be presumed; and that it must be intended that such tithes were by due course of law aliened, or had been in fact released by some former impropriators; although the conveyance, or release, or other legal discharge were lost or destroyed: And in another case, (*d*) the party sued insisted, that the lands he occupied had been from time immemorial enjoyed freed, and discharged from all tithes; and that he being only tenant of the lands, and not having any ancient records, or deeds relating to the same, he could not set forth his exemption; but hoped that his lessor would when required: On (*e*) both these occasions, the matter not being deserted, but steadily litigated by the tithe-owners, the defence was held unavailable, and an account decreed; the court being of opinion, that the presumption arising from constant non-payment is not sufficient, unless the defendant can shew, either that the lands were parcel of the possessions of one of the greater abbeys, and had been holden by them from time immemorial discharged from the payment of tithes (*f*); or that

(*c*) Com. R. 643. Gwill. 757. Aldermen, &c. of Bury St. Edmund's *v.* Evans.

(*d*) Gwill. 904. Breary *v.* Manby.

(*e*) Bunb. 345. Gwill. 771. 3 Burn, Eccl. l. 393. Gwill. 904. n. S. P. Gwill. 1324. Nash *v.* Thorn. See also Jennings *v.* Lettis, Gwill. 952. and Gwill. 619.

(*f*) Clavill *v.* Oram, Gwill. 1354.

some of the impropriators had in fact released the tithes. These decisions, rather modern as they are, have been followed by a still later determination; where (*g*) a lay impropriator having established his general right, the defendant insisted on exemption from payment of hay, and [166] agistment-tithe, on the ground of never having paid these tithes, and from such non-payment, he wished the Court to presume a grant or conveyance of these tithes from the lay impropriator: The Court declared it was clear, that against an ecclesiastical rector this defence could never be set up in any shape; whether a lay impropriator could have the same benefit was at first doubted; but that point seemed at rest, three successive decisions upon it having fully established, that there is no difference in that respect between a lay, and an ecclesiastical rector. (*h*) Yet, notwithstanding these adjudications, (*i*) more recent authorities appear to have rendered it somewhat questionable, and unsettled, whether, where the tithes are not claimed by a spiritual rector, but have devolved to ecclesiastical corporations, who might have aliened till restrained by statute, or to lay impropriators, or their lessees, a grant or release of such tithes may not, under the circumstance of constant non-payment, be presumed. For in the latter of these cases, it was thus reasoned by the court, that the negative proposition would proceed on the ground, that a lay rector who can convey, contract, and diminish his right, which a spiritual rector is incapable of doing, is not to be barred from his right to any particular tithe by length of time, or the circum-

(*g*) 3 Anstr. 702. Gwill. 1442. Nagle *v.* Edwards. See also Fanshaw *v.* More, Gwill. 780.

(*h*) See Whieldon *v.* Harvey, Gwill. 951. Scott *v.* Airey, Gwill. 1176. Fanshaw *v.* Rotheram, Gwill. 1177.

(*i*) Gwill. 1513. Oxenden *v.* Skinner, Gwill. 1620. Rose *v.* Calland.

stances attending the receipt of his other tithes: Lord Loughborough C. declared his reluctance to go to that extent; yet his final determination has such an aspect. For on looking into the case before cited, negativing the effect of presumption arising from non-payment, though his lordship expressly stated, he did not agree with it; yet he refused to compel a purchaser to take a title to land as exempt from tithes in the face of that decision, or to decree him to enter into a lawsuit. As (*j*) to the [167] principle that a layman is incapable of tithes in pernancy, and that a grant of tithes to him is void; if not from the disability of the grantee to take, from the impropriety of the thing granted, this particular argument may be thought to have lost its force against presuming a non-apparent deed, since tithes are daily conveyed from person to person (*k*); and it is no longer necessary to derive the title to them from one of the dissolved monasteries. And where there has been an actual pernancy of tithes by laymen under conveyances, as lay property for a long period of time, courts of equity will not afford their aid to disturb such a possession. Thus where in answer to a bill for an account of tithes, the defendants deduced their title, but without shewing its original commencement, to two-thirds of the tithes of the manor in question, from the time of Henry the eighth, accompanied with evidence that these lands paid only one-third of the tithes, that is, a thirtieth part of the produce to the rector, and were therefore called thirtiethable lands, the rector never receiving more than one-third, the lord of the manor receiving the other two-thirds, and letting some farms with those two-thirds to the occupiers; the bill was dismissed, and with

(*j*) Com. R. 649, 650. Gwill. 762, 3. Charlton v. Charlton, Bunb. 325. Gwill. 715.

(*k*) See supra, 16. See also

costs against the plaintiff the purchaser of the advowson, being also lessee of the tithes who was affected with notice of what he in fact was purchasing (*l*). I should, therefore, rather ascribe the general maxim, that a prescription *de non decimando* is not allowable against a spiritual rector, *to the great danger accruing to the church from the opposite doctrine,* and should refer the comprehension of lay impropriators within the rule *to the principle of uniformity.* I have dwelt the longer on these [168] matters as being very important, and because as to lay impropriators the subject may be considered as involved in some doubt.

I have before adverted (supra, 148,) to the distinction between custom and prescription. A prescription strengthens all other titles; but, generally speaking, is of no force when pleaded in discharge of tithes; because the law presumes that a layman could not be absolutely discharged without the consent of the parson, the patron and the ordinary; and then also, as I have before observed, the grant of such discharge, or exemption, must appear (*m*), supra, 164, 165.

It is not, however, universally true that prescriptions *de non decimando* are illegal. The prerogative of the crown, the rights of spiritual persons in that character, and the case of dissolved monasteries form important exceptions to the maxim; and are all referable to, or at least consistent with the principle, that *ecclesia decimas non solvit ecclesiæ* (*n*).

(*l*) 2 Ves. Junr. 625. Gwill. 1430. Strutt *v.* Baker.

(*m*) Hicks *v.* Woodeson, Gwill. 550. Slade *v.* Drake. Hob. 295. Gwill. 385. 389. Jennings *v.* Lettis, Gwill. 952. Sydown *v.* Holmes, Sir Wm. Jones, 368. Gwill. 479. Fanshaw *v.* More, Gwill. 780.

(*n*) 2 Woodd. Vin. L. 99. Vid. supra, 57.

I. With respect to this prerogative of the crown, the king is merely capable of prescribing *in non decimando*: without any prescription sufficiently proved, either express or implied, crown lands, although demesne, are not discharged from tithes (*o*). This capacity of the king's prescribing *in non decimando*, results from his being *persona mixta*, from his being invested with the supreme ecclesiastical jurisdiction, as well as with the first civil magistracy of the realm (*p*). This privilege, although, generally speaking, personal in the king, extends to his lessee for years, or at will; for the possession of such tenant is in point of law, the possession of the landlord; and, [169] therefore, such lessee of the crown may also be discharged from tithes by a prescription *de non decimando* in the king and his farmers (*q*). If the law were different, this royal privilege would in a great measure be nugatory; since the king cannot cultivate his lands himself; but it extends to such lessee for years, or at will only. If the crown alien the freehold of the land so exempt, the patentee shall pay tithes, and the prescription is for ever extinguished, although the same lands should return to the crown again by escheat, or forfeiture (*r*).

II. So all ecclesiastical persons, as bishops, deans, prebendaries, parsons, and vicars, are, as formerly was the case of abbots, and priors, exempt from tithes in respect of lands which they hold in their spiritual character. A bishop shall not pay tithe out of lands which are parcel of

(*o*) Compost *v.* ——, Hardr. Gwill. 514.

(*p*) Earl of Hertford *v.* Leech, Gwill. 494, 495. See also Pigot *v.* Heron, Gwill. 204.

(*q*) Williams *v.* Petchy, Com. Dig. Tit. Dismes (E. 2.) Sed vid. Gwill. 184. and Hotham *v.* Foster, Gwill. 869.

(*r*) Earl of Hertford *v.* Leech, Gwill. 486. Compost *v.* ——, Hardr. Gwill. 514. See Parson of St. Botolph's case, Litt. Rep. 141. Gwill. 434. Gibs. 673. Boh. 282, 283.

his bishopric. The rector shall not pay tithes to the vicar, nor *è converso;* and so in case of lands belonging to a bishopric, and consequently held discharged of tithes, which were conveyed to a layman, and afterwards reconveyed to the bishopric, the prescription *non decimando* was held to be revived; Unity of possession will not extinguish it, nor a release of all the right to the land (*s*).

The lessees of spiritual persons, although such lessees be laymen, may also be discharged, if a prescription comprehending them be alleged, and proved. A bishop may prescribe *in non decimando,* in regard to lands part of his [170] bishopric, for himself, and his farmers (*t*). His copyhold, or customary tenants, may have the benefit of a similar prescription (*u*). For these spiritual lessors are presumed to derive the advantage of such exemption by the reservation of higher rents, or the acceptance of larger fines. *The exemption therefore is consonant to the principle I have just expressed, that ecclesia decimas non solvit ecclesiæ,* because if the bishop could not lease the lands exempt from tithes, he would forego the advantage of taking higher rents and fines, and thus in effect, would himself pay the tithes to the parson. But this privilege does not extend to churchwardens in regard to lands settled for the repairs of the church (*v*). And if a rector demise his glebe free from all exactions, yet he is entitled to the tithes of it from his own tenant (*w*). So if

(*s*) Bishop of Lincoln *v.* Cooper, Cro. Eliz. 216. Gwill. 163. 1 Leon 248. S. C.

(*t*) 1 R. A. 653. Deg. p. ii. c. 16. Wright *v.* Wright. Gwill. 167. See Benning *v.* Douce, Gwill. 622.

(*u*) Crouch *v.* Fryer, Cro. Eliz. 784. Gwill. 218. 2 Wooddes, Lect. 102. in note. Stephenson *v.* Hill, Gwill. 894.

(*v*) 1 R. A. 653.

(*w*) Wats. C. L. 403. Ed. 1701. Sav. 3 Mo. 910. Cro. Eliz. 479.

he keep the glebe in his own hands, and sow it with corn, and die before severance, his executor, or vendee, in case he had sold in his life-time, must pay tithe to the succeeding incumbent (*x*). So if he lease his rectory, reserving the glebe lands, he shall pay tithes in respect of them to his lessee. But if the vicar be specifically endowed of the small tithes of the glebe lands of the parsonage, he will be entitled to them, although such glebe be in the hands of the appropriator (*y*).

A county, or a hundred, or any well ascertained precinct may prescribe *in non decimando* (*z*). But this proposition must be understood with various qualifications, and as not infringing the general principle, that a layman shall not prescribe *in non decimando*. Such [171] prescription shall be allowed only in cases of articles tithable by custom (*a*); but not in respect of things tithable of common right: And the ground of the distinction is this, that in respect to things tithable by custom, such districts may so prescribe, and be discharged, unless the existence of a custom derogatory to the ancient and ordinary right of exemption be proved; but with regard to articles tithable *de jure*, it were incongruous to say, that such districts should be capable of prescribing *in non decimando* in those instances, in which the individuals of whom it is composed, have no such privilege (*b*). Nor shall these districts plead a custom for an ab-

578. Barton *v.* Hollis, Fitz. 78. Gwill. 1613.

(*x*) Wats. 403. Vid. supr. 16. 58. 68, 69.

(*y*) Gibs. 661. Deg. p. ii. c. 2.

(*z*) 3 Burn, Eccl. l. 5th Edit. 413. Hicks *v.* Woodeson, 4 Mod. 336. Gwill. 550. See Johnson *v.* Bois, Gwill. 373. and Thompson *v.* Hill, Gwill. 672.

(*a*) 2 Wooddes, Lect. 99. 2 Salk. 655, 656. 1 Lord Raym. 137.

(*b*) 2 Salk. 655. Lord Raym. 187. Gibs. 674. Smith *v.* Johnson, Gwill. 606.

solute discharge of their lands from the payment of all tithes without any substitution; a sufficient maintenance must be left by the parson (*c*). A claim of such exemption may be also invalid in respect to the territory to be covered by it, and was so decided in a recent case (*d*) where it extended to certain parishes enumerated in the answer, which had not any common denomination, or any mark, by which they could be considered as a distinct and separate district.

III. The last species of exception to the rule that a layman cannot prescribe *in non decimando* exists in respect to estates which formerly belonged to religious houses (*e*). All abbots, and priors, and other chief monks, [172] were originally subject to the payment of tithes, as well as other persons, until pope Pascal the second exempted generally all the religious orders from the payment of tithes in respect of lands in their respective possession; or as it was expressed *dum propriis manibus excoluntur*. This general discharge continued to exist until the time of king Henry the second, when pope Hadrian the fourth restrained it to the three religious orders of Cistercians, Templars, and Hospitallers; in whose favour the same exemption was established by the general council of the realm. These constituted the orders, which are commonly called the privileged orders, since they were entitled *ratione ordinis* to the privilege of being discharged from tithes of lands in their own occupation.

This privilege of exemption pope Innocent the third,

(*c*) Lord Raym. 187. Hicks *v.* Woodeson, Gwill. 550. Gwill. 607. in note Russel *v.* Partridge, Gwill. 270.

(*d*) Nagle *v.* Edwards, 3 Anstr. 702. Gwill. 1442. See Jordan *v.* Colley. Bunb. 61. Gwill. 625.

(*e*) 3 Burn, Eccl. l. 5th Edit. 394. 404.

in the year 1198, by a bull or decretal epistle, attempted to extend to the order of Premonstratenses; and although such privilege appears by the (*f*) ledger book of the abbey of Cockersand belonging to that order, to have been allowed in the 12th year of the reign of Edward the third, and a definitive sentence given accordingly; and although (*g*) Selden expressly mentions, that they are exempted by that bull for lands of their own culture, yet it is now clearly held, that the bull did not exempt that order from the payment of tithes of lands in their own occupation, unless it were received, and allowed in England. But the books are silent as to the allowance of this privilege to the order of Promonstratenses, and consequently a title to hold lands discharged from the payment of tithes, either absolutely, or while in the manurance of the owners of the inheritance, cannot be derived [173] under that order (*h*).

All spiritual persons, or corporations, nevertheless, were capable of having their lands totally discharged of tithes by various other modes, as by real composition; by the pope's bull of exemption, if recognized by the laws of England; by prescription, having never been liable to tithes, in consequence of having always been in spiritual hands.

But the council of Lateran, in the year 1215, which was a general law received in England (*i*), farther restrained the exemption, *ratione ordinis*, of religious houses from the payment of tithes, to those lands, of which they were in possession before that council.

(*f*) See Dickenson *v.* Greenhill, Gwill. 409.

(*g*) Seld. Hist. of T. c. 13. p. 406.

(*h*) Townley *v.* Tomlinson, Gwill. 1004. 1017.

(*i*) Stavely *v.* Ullithorn, Hardr. 101. Gwill. 502.

The Cistercians, however, in course of time, evaded this last mentioned restriction by procuring papal bulls to exempt their lands also which were leased in farms. To obviate this practice, the statute of the 2d of Henry the fourth, c. 4. was passed, by which it was enacted, that all persons of that, or any other order, religious or secular, who should put such bulls in execution, or should from thenceforth purchase such bulls, or by colour thereof should take advantage in any manner, should incur the penalties of a præmunire (*k*).

Thus the statute operated to prevent them from purchasing any such exemptions in future, but left their [174] privileges untouched as they existed before it passed; applicable to such lands only, as such religious persons were possessed of prior to the Lateran council just referred to: But after that council, they obtained many lands which consequently were not exempted. To these restraints imposed by the council of Lateran, and by the statute of the 2d of Henry the fourth succeeded another, arising from the operation of the statute of 27th of Henry the eighth, c. 28. By that statute various abbeys, or religious bodies, were dissolved, and the discharges and exemptions of their lands from tithes, expired and vanished with the spiritual bodies, to which they were annexed (*l*); and their lands, therefore, became tithable. But this consequence was obviated in respect of such abbeys and religious houses as were dissolved by the statute 31st of Henry the eighth, c. 13. by which it is enacted, that all persons who should come to the possession of the lands of

(*k*) 3 Burn, Eccl. l. 403. 5th edit.

(*l*) Wright *v.* Gerard, Hob. 306. Gwill. 375. Slade *v.* Drake, Hob. 295. Gwill. 390. Sydown *v.* Holmes, Gwill. 479.

any abbey thereby dissolved (*m*), should hold them free and discharged from tithes, in as large and ample a manner (*n*) as the abbeys themselves had formerly held them: And after a difference of opinion, it seems to be settled, that the possessions of the order of St. John of Jerusalem, which came to the crown by the statute of 32d of Henry the eighth, c. 24. are exempt from the payment of tithes, by force of the protection of the statute of 31st of Henry the eighth, in the hands of the king [175] and his grantees (*o*). So the statute of 31st Henry the eighth has been held sufficiently comprehensive to include all monasteries which were dissolved after the 4th February, 27th Henry the eighth, and the lands of any such monasteries are exempt from the payment of tithes by virtue of that statute, though the crown might have granted them away before that statute passed (*p*).

From this provision arose a new species of discharge unknown to the common law, the unity of the possession of the parsonage, and land tithable in the same persons; for if the monastery, at the time of the dissolution, were seised of the lands and rectory, and had paid no tithes in

(*m*) See catalogue of the monasteries of the yearly value of 200*l.* dissolved by Stat. 31 Henry VIII. and capable of being discharged of tithes. Appendix.

(*n*) Hankey *v.* Gay, Bunb. 37. Gwill. 619. Green *v.* Bulser, 2 Co. 42. Gwill. 189. Benton *v.* Not, Moore, 528. Gwill. 208. Lambert *v.* Cummins, Gwill. 1016.

(*o*) Cornwallis *v.* Spurling, Cro. Jac. 57. Gwill. 224. W. Jon. 182—191. Freem. 299. Keble, 217. Hanson *v.* Fielding, Gilb. Eq. Rep. 225. Gwill. 663. Urrey *v.* Bowyer. Stathome's case, Dyer, 277. b. Gwill. 132. Peykirke's Parson case, Dyer, 349. b. Gwill. 136. Nash *v.* Molins, Cro. Eliz. 206. Gwill. 162. 250. The Serjeant's case, Gwill. 281. Fosset *v.* Franklin, Sir Thos. Raym. 225. Gwill. 1579. Whitton *v.* Weston, Gwill. 410. Sir William Jones, 182. Star *v.* Elliot, 1 Freem. 299.

(*p*) Tate *v.* Skelton, Gwill. 1503.

respect of them within the memory of man, such lands shall now be exempted from the payment of tithes, on the ground of a (*q*) perpetual unity of possession, in contemplation of law, because the same persons who had the lands, having the parsonage, they could not pay tithes to themselves (*r*).

But to render such union valid, it must have been accompanied with certain incidents: First, it must have been *just*, claimed by right, and founded on a lawful title, not the effect of disseisin, or other tortious or unjust act, for an union so produced would not have been a valid discharge within the statute. Secondly, it must have been *equal*; there must have been a fee simple, both in the lands, and in the tithes; as well in the lands from which the tithes arose, as in the parsonage, or rectory; for if those religious bodies had held the lands only by lease, that would not have amounted to such an union as the [176] statute intended. Thirdly, it must have been *free*; free from the payment of any tithes, in any manner; for if the abbots, or their farmers, or tenants for years, or at will, had paid any tithes whatever before the dissolution, it may be alleged as sufficient to avoid the unity pleaded in discharge of tithes (*s*). And, fourthly, it must have been *perpetual*; the religious houses must have been endowed time out of mind, and must have had in their hands both the lands, and the rectory united perpetually, or before the memory of man, that is, according to the rule prescribed by the common law, before the first year of Richard the first, discharged from tithes; for if by records, or ancient

(*q*) See Clavill *v.* Oram, Gwill. 390.

(*r*) God. 383. Boh. 241. 248. Slade *v.* Drake, Hob. 295. Gwill. 1354.

(*s*) See Lamprey *v.* Rooke, Ambl. 291. Gwill. 859.

deeds, or other legal evidence, it can be ascertained, that the lands, or the rectory came to the abbey since that period of time (*t*), or that the foundation of the abbey was subsequent to the time of memory (*u*), such union cannot be alleged to be perpetual. Nor merely from the abbey's being in possession of the lands at the time of its dissolution, shall an immemorial possession be presumed; but to shew that the abbey had a right to prescribe, such immemorial possession must be proved (*v*). And, moreover, the lands of such religious houses as were privileged *ratione ordinis* were exempt and discharged from the payment of tithes only during the time they were holden in their manurance, and occupation; the exemption extended to their lands only *dum propriis manibus excolebantur*; and consequently the lands of such houses as were dissolved by the statute of 31st of Henry the eighth, shall be free from the payment of tithes only to the same extent, as they were discharged, while they belonged to such religious houses; that is to say, while they are in the hands and manurance of the owners of them: It is requisite therefore for a party who claims such privilege of exemption expressly to allege, and prove that he is in the occu- [177] pation and manurance of the lands for his own use. It is not sufficient for him for this purpose to state, that he is seised of the lands, for he may be seised of them, and yet another may manure, and occupy them (*w*).

(*t*) Boh. 248. 250. Priddle *v.* Napier, 11 Co. 8. b. Gwill. 236.

(*u*) Gibson *v.* Holcroft, Yelv. 31. Gwill. 222. Prowse *v.* Dr. Leyfield. Gwill. 264.

(*v*) Clavill *v.* Oram, Gwill. 1354.

(*w*) Fox *v.* Bradwell, Com. Rep. 498. See also Cowley *v.* Keys, Gwill. 1308, 1309. vid. Stathome's case, Gwill. 132. and Dickenson *v.* Greenhill, 2 Roll. Rep. 479. Gwill. 401. Bradshaw *v.* Clifton, Gwill. 1014.

It has been remarked (*x*), that it seems extraordinary that this distinction between occupiers and owners should have been continued since the statute, for that it is evident that no personal privilege to laymen was intended by the statute; but merely an estate in that condition. But this exemption from tithes is so narrowed only in those cases, in which the religious houses were privileged *ratione ordinis*. They were by other means, as we have just seen, (supra, 173,) capable of an absolute discharge, and then their privilege was not restricted to lands in their actual occupation, but extended also to lands in the possession of their tenants; therefore, in a case (*y*) in which it was in evidence, that the lands in question belonged to one of the greater houses dissolved by statute 31st of Henry the eighth, and that they had never paid tithes, the court presumed an absolute, not a qualified exemption; not merely a limited discharge, while in the hands of the owner of the inheritance, but a general discharge while in the hands of the occupier also; although it were moreover in proof, that the house was a Cistercian abbey; that other lands, part of the same farm, paid tithes, while in the hands of tenants, and that the lands in question were never in lease. But in a case (*z*) in which such a privilege, extending not only to the owner, but to his tenants, farmers and occupiers, was claimed by parties having only *libertatem falcandi* for fodder for their cattle levant and couchant upon their closes, as appurtenant to their houses and lands, the Court seemed to think that they were not within the prescription: for that they were

(*x*) By Clarke, Baron, Gwill. 821.

(*y*) Ingram *v.* Thackstone, Gwill. 819. See also Lamprey *v.* Rooke, Ambl. 291. Gwill. 859.

(*z*) Cotes *v.* Warner, Gwill. 272.

neither farmers, tenants, nor occupiers, and that a prescription which tends to bar the church of tithes is to be taken strictly.

Nor is it a sufficient ground of objection to such [178] discharge from tithes *ratione ordinis*, that the lands were in the occupation of a lessee under a lease granted by the abbey, and subsisting at the time of its dissolution; for although in the case of Lord *v.* Turk (*a*) it was held, that the lands which had belonged to the Cistercian order were not so discharged, because it appeared that they were in the hands of tenants at the time of the dissolution of that order, and consequently were not discharged when they devolved by virtue of the statute upon king Henry the eighth; and although in the case of Cowley *v.* Keys (*b*), in which it appeared that the lands in question belonged to the abbey of Coggleshall, admitted on all sides to have been one of the greater abbeys, and were not in the actual occupation of the abbot and convent at the time of their dissolution; and it was strenuously contended that the words of the statute of the 31st of Henry the eighth, c. 13. namely, "have, hold, occupy, possess, use, retain, and "enjoy," are very precise, and strong, and evidently confine the exemption to the lands actually in the occupation of the abbey at the time of the dissolution; that they were not, therefore, within the saving of the statute: and moreover the case of Lord *v.* Turk was urged in support of that construction; yet the Court, on the authority of Porter *v.* Bathurst (*c*) determined on a special verdict in prohibi-

(*a*) Bunb. 122. See also Benton *v.* Trot, Moore, 528. Gwill. 208. Dobitoft *v.* Curteene, Gwill. 287. and Dickinson *v.* Reade, Gwill. 358.

(*b*) Gwill. 1308.

(*c*) Porter *v.* Bathurst, Cro. Jac. 554, 559. Gwill. 132, in not. and 373.

tion, as well as on principle, and the reason of the [179] thing, that the words referred to in the statute ought not to be restrained, so as to pass only a possessory right; that the words "have and hold" are constantly made use of to convey the largest estates, and do not apply merely to manurance: that there could be no doubt of the existence of the privilege at the time of the dissolution, suspended, indeed, in point of benefit, but continuing in point of right; it being clear that the privilege was not destroyed by the lands going out of the hands of the abbey; but would result to them together with the lands, and was, therefore, subject to the provision of the statute (*d*).

But where *an abbot,* having a privilege to be discharged of tithes, *quamdiu manibus propriis,* in the time of Edward the fourth, *made a gift in tail,* and the abbey was dissolved by stat. 31st of Henry the eighth, it was clearly held that the donee of the issue should not be discharged, for the statute discharges none, but as the abbot was discharged at the time of the dissolution, so that the party must claim the estate, and discharge under the abbot since the statute; and the consequence would have been the same, if by a common recovery the reversion had been barred before, or subsequently to the statute (*e*).

It is not, however, requisite that the owner of lands formerly part of the possessions of a greater abbey, should hold them in fee simple, in order to their being discharged from tithes. It is clear that a tenant in tail of such lands is discharged, *quamdiu propriis manibus excoluntur.* Nor is it necessary to such discharge, that the owner should

(*d*) See Gwill. 432. 248. Gwill. 431.

(*e*) Farmer *v.* Shereman, Hob.

have an estate of inheritance in such lands (*f*). In a case (*g*) in which a party who claimed the exemption, as having the lands in his manurance, was only tenant for life under a settlement, with a remainder in tail to his daughter; although it was insisted, in opposition to his claim, that he had not that quantity of interest in him, which could support the privilege; that to entitle the lands to the exemption, the person occupying them must be the owner of the inheritance, and have the same estate in him, which the monastery had; and the case of Wilson *v.* Redman (*h*) was cited as an authority to shew that a tenant for life, or years, is not within the statute, and that, therefore, the privilege contended for could not attach; yet the Court decreed, that the tenant for life was exempt, observing, that in the case of Wilson *v.* Redman the parties appear to have had a fee simple, and therefore it not being necessary in that case to decide the point, it could not be considered as of any authority respecting it: that it is impossible that the lands can now be holden precisely in the same manner as they were holden by the monastery; that the monastery had them to them and their successors, but a man now has them to him and his heirs. That as a fee simple may be divided into portions, into different estates for life, in tail, and remainder in fee; where is the difficulty in saying that the tenants of each portion shall have the benefit as they succeed? That there is no reason why a tenant for life should be excluded from the benefit, any more than a tenant in tail, who it is agreed is exempt; or why all the component parts of the estate should not be exempt as they severally come into possession; but such exemption cannot be insisted [181] on if the lands be in the hands of a lessee for years, or

(*f*) Brownl. 44. Gwill. 1516.
(*g*) Hett *v.* Meeds, Gwill. 1515.
(*h*) Hardr. 174.

even for life, under a common lease; for there is a material difference between a person who is merely a lessee for life, and one who is tenant for life, under a will, or a grant; the latter has that very estate in him, which the monks themselves had; for they were not the owners of the inheritance, they had the enjoyment only during their lives (*i*).

If lands were discharged of tithes in the hands of a prior, and the priory were vested in the king by the stat. of the 31st of Henry the eighth, so that such discharge as existed in the priory ought by law to continue; although tithes shall have been paid ever since the passing of the statute, yet it was held, that even such constant payment should not operate so as to make the lands chargeable (*j*).

Also, where lands were exempted from tithes, as being parcel of the demesne of an ancient monastery, which were enclosed by act of parliament, it was held that they were not rendered liable to tithes, by a clause in the act, providing that the rector, or impropriator of the parish, or his lessee, should receive all kinds of tithes from the new enclosures, notwithstanding any modus or pretence of a modus, or composition in any other parts of the parish, or any exemption whatsoever; on the ground that such general words ought not to destroy a [182] clear legal exemption, when the whole scope of the clauses was to preserve merely such right as the impropriator, or his lessee, had at the time of passing the act (*k*).

(*i*) Argdo, Gwill. 1516.

(*j*) Earl of Clanricard *v.* Lady Denton, Gwill. 363.

(*k*) Pratt *v.* Hopkins, 3 Bro. P. C. 521. Gwill. 704.

A saving clause at the end of an inclosing act, reserving the rights of all persons not parties to the act, was held not to save the rights of a rector not party to the act, where an enacting clause in the statute expressly exonerated the lands from tithes (*l*).

Where the lands, from which the tithes were demanded, were copyhold, parcel of a manor, of which a prior was seised in fee, and was also parson imparsonnee, by which union it was insisted, that the tithes were extinguished, it was held, that the union was no discharge of the tithes of the copyhold (*m*). Nor is a college given to the crown, by stat. 1 Edw. VI. entitled to an exemption from tithes, by virtue of the above-mentioned stat of the 31 Henry VIII. (*n*). A common appurtenant to an estate, as I have before intimated, (*o*) is entitled to the same exemption, as the estate itself (*p*). But a custom that occupiers of ancient messuages in certain parishes, within a certain manor, shall pay the tithes arising from a common and other waste lands appurtenant to their messuages, to the rector or vicar of the parish in which the ancient messuages are situate, and not to the rector, or vicar of the parish, in which the right of common is enjoyed, has been held good (*q*).

Although a prescription in *non decimando* is generally, and with these exceptions only which I have above stated, unlawful, and incapable of being maintained, yet there is an essential distinction between a prescription in *non*

(*l*) Riddle *v.* White, Gwill. 1387.

(*m*) Branche's Case, Moore, 219. Gwill. 156. See also Benton *v.* Trott, Moore, 528. Gwill. 208.

(*n*) Green *v.* Balser, 2 Co. 42. Gwill. 189.

(*o*) Supra, 89.

(*p*) Lambert *v.* Cummins, Bunb. 138. Gwill. 647.

(*q*) Etherington *v.* Hunt, Gwill. 1598.

decimands, and a claim of a portion of tithes, in opposition to the rector, if the claim be supported by evidence of the actual enjoyment of the pernancy of the tithes. The title is not unlawful: a good title may have been derived to the party in possession. The title, therefore, not being simply unlawful, long possession is evidence of the title; and on this principle, where a defendant in answer to a bill filed by the rector for tithes, claimed a portion of tithes, and supported that claim by evidence of long possession, the Court of Exchequer would not interpose, even so far as to direct an issue, but left the plaintiff to pursue his legal remedy (*r*).

(*r*) Scott *v.* Airey, Gwill. 1174. Edwards *v.* Lord Vernon, Gwill. 1177. in note Fanshaw *v.* Rotheram, Gwill. 1177.

CHAPTER VIII.

Exemptions partial.

HAVING discussed the doctrine of general exemption from the payment of tithes, I proceed now to the consideration of such species of exemption as are merely partial; which comprise, as I have before remarked, moduses, and compositions (*a*).

The proper definition of a *modus decimandi*, or in common language a *modus*, is a composition for tithes, which has existed from time immemorial (*b*); or in other words, where by custom, or prescription, a particular mode of tithing has subsisted different from that authorised by the general law. Before the restrictive statutes, the parson, patron and ordinary were capable of binding the revenues of the church. A modus, therefore, shall be presumed to have had its commencement from an instrument signed by those parties, which has been lost by lapse of time (*c*); but then there can be no colour of reason for saying, that because such instrument has been lost, the composition established by it should be lost also (*d*).

There are various descriptions of moduses. A modus

(*a*) Supr. 164.

(*b*) Per Holt C. J. Startup *v.* Dodderidge, Gwill. 591.

(*c*) Ord *v.* Clark, Gwill. 1437. 3 Anstr. 638.

(*d*) Chapman *v.* Monson, 2 P. Wms. 573.

is sometimes a pecuniary compensation, as two-pence an acre for the tithe of land; sometimes it is a compensation in work and labour, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration [184] of the owner's making it for him (*e*): sometimes in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity when arrived to greater maturity, as a certain number of fowls in lieu of tithe eggs (*f*).

Moduses are also distinguishable with reference to the extent of the lands which they cover. A general custom prevailing throughout a parish is different from a prescription for a particular farm. The former species is called a parochial, and the latter a farm modus. A parochial modus extends to all the tithes of that species, which arise within the district; but a farm modus depends upon more particular circumstances, and is more strictly confined, *supra*, 124 (*g*).

Such is the general nature of a modus; but it is necessary to take a more minute view of its various incidents, and properties.

There are many requisites to constitute its validity: 1. A modus must be fixed and invariable; or, in other words, a certain recompence for a certain duty. 2. Such substitution for tithes must in its origin have been beneficial to the parson, and not for the emolument merely

(*e*) See Andrews *v.* Lane, Gwill. 473.

(*f*) Somerton *v.* Cotton, Gwill. 199. Cro. Eliz. 587. 2 Bl. Com. 29. See also Austin *v.* Pigot, Gwill. 217. Cro. Eliz. 736. & supra, 63.

(*g*) Gwill. 1323. See Bishop *v.* Arundel, Gwill. 585. & Lloyd *v.* Small, Gwill. 619. & Scott *v.* Allgood, Gwill. 1369.

of third persons. 3. It must be different from the article compounded for. 4. A modus for one species of tithes shall be no discharge for the payment of any other species. 5. It must be as durable in its nature, as the tithes discharged by it. Lastly, it must not be too large, which the law denominates a rank modus.

In respect to the first of these properties, that a modus must be certain and invariable, it is a necessary consequence of its having been an original real compo- [185] sition, which in its essence must have always been one and the same; an uncertain or fluctuating payment, or in legal language a desultory, or leaping modus, could not have been settled from time immemorial. Therefore it has been held that if a party has paid a penny for a lamb for fifty years, and afterwards pays tithe in kind before the custom is established, although he again pay a penny for twenty years, he cannot describe *in modo decimandi* (*h*). So a modus of one shilling for every fat bullock, agisted within the parish in lieu of the tithes of agistment of all barren and unprofitable cattle agisted upon lands within the parish, and a modus of one penny *for any small* quantity of hemp sown every year, by every occupier of lands within the parish, were disallowed (*i*). So a modus to pay a penny, or *thereabouts*, for every acre of arable land, is illegal (*k*). So a modus to pay four shillings for every day's ploughing of wheat, and two shillings for every day's ploughing of barley, has been adjudged invalid, it being uncertain what would be the amount of every day's ploughing (*l*). So a modus to pay two shillings in the

(*h*) Flemyng v. the Tenants of Dudley. Sav. 13. Gwill. 155. Deg. 308.

(*i*) Boscawen v. Roberts, Gwill. 946.

(*k*) 2 Roll. Abr. 265.

(*l*) Cunn. L. of T. 45.

pound out of the rent reserved (*m*), or a modus to pay one shilling in the pound on the yearly rent of rack-rented farms (*n*), is void: A modus is not applicable to rents reserved from time to time, on frequent new reservations. On the same principle, a modus to pay the yearly value of farms which are underlet is also bad (*o*). On the same ground of uncertainty an alleged modus of three-pence payable by the occupiers of every ox-gang of land, con- [186] taining sixteen acres of arable, meadow, and pasture, after the rate of seven yards to the pole or perch, in lieu of the tithe of hay arising on the ox-gang, has been held invalid; for that there was no specification of the proportions of such different species of land, and there was nothing to pay for an ox-gang of arable only, or an ox-gang of arable and pasture. By the fluctuation, therefore, of lands in the parish it might happen that the arable might be occupied separately from the meadow, or pasture. It would have been a very different case, if the ox-gang had been computed on the actual state of the occupation, on the day on which the tithe was to be demanded, as on every sixteen acres, consisting of all the arable, and all the meadow, and all the pasture that each man had; for, on that supposition, the whole parish would contribute to the vicar a certain sum at all events; because then all the lands in the parish, reduced to their own proper ox-gang, would contribute their proportions to one fixed and certain recompence for the tithe of the meadow land, which would be always payable to the vicar out of the specific lands, independent of the uncertainty and fluctuation of the occupation (*p*). A modus of the sum of one penny,

(*m*) Byne *v.* Dodderidge, 1 Ld. Raym. 696. Gwill. 578. Vid. Startup *v.* Dodderidge, Gwill. 587. 591, 592.

(*n*) Bean *v.* Lee, Gwill. 609.

(*o*) Ibid.

(*p*) Markham *v.* Laycock, Gwill. 1339.

usually called tilth-penny, to be annually paid by the respective occupiers in lieu of all tithe-hay arising on lands part of certain tenements, was also held incapable of being supported, it being a recompence for a tithe wholly uncertain, fluctuating in its amount, varying according to the changes in the occupation of the lands, to be reduced to a single penny, if not to be wholly annihilated; for according to such a modus, if a man has sixty acres of hay, he pays only one penny, and if he lets them to sixty several persons, they shall pay one penny each; and the converse of the proposition more strongly evinces its unfairness: if sixty persons pay one penny, and they let their land to one individual person, one penny [187] only shall be paid (*q*). A modus, that all occupiers of farm-houses on the north side of a certain lane, with the lands *usually* occupied therewith, have time out of mind paid three-pence at Michaelmas in each year for each cow, and all occupiers above the same lane, or on the south side thereof, with the lands *usually* occupied therewith, have time out of mind paid two-pence for each cow in lieu of tithe of milk in kind, has been declared to be uncertain and void; for that the house may fall down and be uninhabited, and then no modus will be payable; nor can any description be more uncertain than that of lands *usually* enjoyed with the tenement, since the lands let with the farm-house may be often changed (*r*). A modus, that the occupiers of Shortflat-bog, called Parsons-bounds, a wet swampy uncultivated piece of ground, lying within the hamlet of Shortflat, have time out of mind annually cut and made into hay of the grass growing thereon *two fothers*, and carried the same at their own expence to the

(*q*) Travis *v.* Oxton, 3 Gwill. 1066. 1081, 1082. See also Turton *v.* Clayton, Gwill. 628. Bunb. 80.

(*r*) Carlton *v.* Brightwell, Gwill. 676. 2 P. Wms. 462.

vicarage-house, in satisfaction for tithe-hay of the whole township or hamlet, and that the same hath been and ought to be accepted as such, and that *a fother* is a certain determinate quantity well-known in those parts, which was proved by the witnesses on both sides to be as much as can be drawn in a long wain by two oxen and two horses, it was held, that this modus was void, on the ground that the fother, as described by the witnesses, was too uncertain; that it made the quantity of hay depend on the condition of the soil, on the strength of the oxen, and the horses, and on the caprice of the occupier, who might take the opportunity to carry it in wet weather, [188] when the bog is scarcely passable (*s*). A modus of four shillings payable at Easter, in lieu of tithe-hay arising on defendant's farm, has also been held void, it not being certain of what a farm consists (*t*). A modus, that there was a meadow in the parish called Parson's-meadow, and that the plaintiff and his predecessors had time out of mind enjoyed the meadow, and also various beast-grasses in the parish, in lieu of the tithes within the parish, was declared by the court not to be good by reason of its uncertainty (*u*): And in a case, in which the defendant insisted on a modus that the occupiers of ancient tenements, within particular vills or townships described within the parish, with their own carriages and horses, led and carried, and ought to lead and carry, a cart-load of peat and turf from Ulverston-moss to the parsonage-house for the use of the parson and rector, his farmer or deputy on such a day, or within the space of every two years, as the parson or rector, or his farmer and deputy, should require the same, in full discharge of all the tithe of hemp, flax, and hay

(*s*) Fenwick *v.* Lambe, Gwill. 646. Bunb. 129. 869. Ambl. 365.

(*t*) Burwell *v.* Coates, Gwill.

(*u*) Birch *v.* Stone, Gwill. 649.

arising on those ancient tenements, was held to be a void modus, *for a cart-load is too uncertain, it may be drawn by two or six horses* (*v*). A modus payable to the parson *or* curate is void (*w*). A modus for the payment of a certain sum of money, but if the lands are in the possession of any other person to pay tithe in kind, *or* the money at the election of the parson, held to be clearly bad, as being desultory (*x*). A modus alleged to be payable *at Easter, or otherwise, when the sheep shall be sold,* held to be of the same description, and adjudged void (*y*). A modus of nine-pence a cow depastured on the meadows, and six-pence a cow depastured on the [189] uplands, in lieu of the tithes of all cows, calves, and milk, was also over-ruled; principally, because the recompence is too vague, for that the parson, in lieu of a certain right at common law, must have a right equally certain by the prescription; and in this case, if a cow were depastured partly on the uplands, and partly on the meadows, he would not know which modus to demand, or how to distinguish them (*z*).

On the other hand, if tenants from time immemorial have been used to pay a certain price for a tithe-lamb, so that the modus is fully established, the modus shall not be destroyed by the parson's encroaching on more, or the tenant's payment of the tithe in kind (*a*). So a modus in lieu of tithe-milk to pay every tenth day's cheese during

(*v*) Tully *v.* Kilner, Gwill. 644. Bunb. 126. Vid. *infra*, 210.

(*w*) Whieldon *v.* Harvey, Gwill. 951.

(*x*) Webber *v.* Taylor, Gwill. 656. Sel. Cas. in Ch.

(*y*) Philips *v.* Symes, Gwill. 654. Bunb. 171.

(*z*) Torriano *v.* Legge, Gwill. 909, and in not. and 1 Bl. Rep. 420.

(*a*) Flemyng *v.* Tenants of Dudley, Gwill. 155. Sav. 13. Howell *v.* Hicks, 2 Inst. 653. Gwill. 1570. And supra, 185.

the space of twenty weeks, the first cheese to be paid on fifteen days after Holyrood-day, seems to have been considered as valid, notwithstanding the objection of uncertainty, and yet it was not stated that one whole day's milk should be used in making it (*b*). So in prohibition, the surmise of a custom, that all the parsons of the church of F., had immemorially held, and enjoyed certain land, parcel of the manor of F., in recompence of all tithes of wood within the parish, was adjudged sufficient, though it was objected, that the lands in question of which tithes were demanded, were not averred to be parcel of the manor (*c*). So six shillings and eight-pence for every yard of land for tithes, is a good modus, although the lands be uncertain (*d*). So a modus to pay to the rector the best buck and doe yearly at every season, in lieu of the tithes for a certain forest, has been established (*e*). In like manner a modus of twelve-pence for a fat beast, bullock, or heifer, and six-pence for every lean beast, bullock, or heifer, was held good, notwithstanding it was objected, that there was an evident uncertainty, as it would be necessary to determine in every instance whether the animal was fat, or lean; but the lord Chancellor observed, that [190] this was a distinction perfectly well established among farmers, and he, therefore, saw no legal objection to the modus (*f*). So a custom for every householder inhabitant within the parish, to pay two-pence at Easter, by the name of *hearth silver, garden silver, shot and waxen silver,* in satisfaction of the tithe of the produce of any garden, yard, or orchard, occupied in the parish by such

(*b*) Wake *v.* Russ, Gwill. 1396. 1 Anstr. 295. and see 1 Roll. Abr. 661. pl. 19.

(*c*) Somerton *v.* Cotton, Cro. Eliz. 587. Gwill. 199.

(*d*) Mason *v.* Hine, Gwill. 951.

(*e*) Conant *v.* Greaves, Gwill. 523.

(*f*) Bishop *v.* Chichester, Gwill. 1316. 1320.

householder inhabitant, and of all woods, cuttings, and loppings, cut in the year upon lands in the parish in his occupation, and also of the agistment-tithe, is good (*g*). In like manner a custom for every person resident, and occupying lands within the parish, to pay three-pence for every sheep sold, or sent out of the parish after old Candlemas-day, and before shearing time, in lieu of the tithes payable in respect of such sheep, is valid (*h*).

Certainty being thus essential to the validity of a modus, it is requisite in a bill in equity claiming to establish such substitution for tithes to state it with reasonable particularity and precision.

Thus, a modus to pay a penny for every ancient farm in a parish, being a farm, and not a parochial modus, *supra*, 124. 184., the boundaries and particular quantities of land of each farm, alleged to be covered by such a modus, must be stated, *infra*, 194. 215.: For it is essential that the parson should be apprised to what lands he is to resort for payment of the modus (*i*). But even in a bill the court does not require a scrupulous strictness in alleging a modus; thus in a bill to establish a modus for ancient orchards, it is not necessary to set out the quantity and boundaries of the orchards, for that is a very distinct case from the case of an ancient farm: the name of an orchard is in the nature of a description, and the mere inspection will help to ascertain it (*k*). So, although formerly it was held that in a bill to establish a modus, a day for the payment of it must be expressly alleged and

(*g*) Bennett v. Read, Gwill. 1272.

(*h*) Ibid.

(*i*) Scott v. Allgood, Gwill. 1369.

(*k*) Ibid. 1371.

proved (*l*); yet, according to modern adjudications, that is no longer necessary, and it is now considered as too strict to require the proof of a particular day; that to state that the modus is payable at or about a particular day is sufficient (*m*); and the court will establish a modus, [191] even though proved to be payable on a day different from that alleged in the bill (*n*). So on a bill to establish a modus, it was objected, that the modus was not properly set out, being pleaded as a farm modus, and the farm not stated to be ancient, and to have consisted immemorially of the same parcels as at that time, and it was urged that the defendant was not bound to extract the plaintiff's meaning by inferences; but the court were of opinion, that as the bill set out the farm with all its parcels, the number of acres, and the abuttals of each close, and averred that the modus had been immemorially paid for the farm, its antiquity was a necessary part of the plaintiff's case; and that such allegation could be supported only by proving that the farm was ancient, and had immemorially continued the same; that no precise words in such case are necessary if the meaning be clear (*o*). Nor is it necessary either in law or equity, in laying a modus to use that express term: Accordingly, a bill, to establish a customary payment of seven pounds per annum in lieu and satisfaction of tithes, was held to contain a sufficient allegation of a modus: Lord Hardwicke C. in such case observing, that the material words are, so much money paid in lieu, and satisfaction of tithes (*p*).

(*l*) Goddard *v.* Keble, Gwill. 631. Bunb. 105. Goodwin *v.* Wortley, Gwill. 715. See also Henrice *v.* Dugard, Gwill. 632. and Gibb *v.* Goodman, Bunb. 328. Gwill. 735.

(*m*) Richards *v.* Evans, Gwill. 802. 1 Ves. 30.

(*n*) Anderton *v.* Davies, Gwill. 1268.

(*o*) Lord Stawell *v.* Atkins, Gwill. 1434.

(*p*) Richards *v.* Evans, Gwill. 802. 1 Ves. 30.

But in an answer insisting on a modus by way of defence still greater latitude is admissible, on this distinction: that if a bill be filed by a landholder to establish a modus, it is reasonable, that he should be restricted to an accurate statement of his claim, for he is bound to know it, before he asserts it in a court of justice; but in the case of an answer, a tenant is compelled within a limited time to answer, and state his defence; and if he give such a statement as will apprize the plaintiff of the general [192] nature of the case to be made against him, it shall be sufficient (*q*). Thus, where the defendant insisted on a modus of four-pence for every acre of grass cut and made into hay in lieu of the tithe of hay, to which it was objected, that it was illegal, inasmuch as it was not stated to be so in proportion for a greater or less quantity than an acre; the objection was over-ruled, and the modus declared to be sufficiently set forth. So in the same cause, the defendant stated, that there were several lands in the parish, which were exempt from tithes, and that there were other lands of which the rector was entitled only to a moiety of the tithes, and the above modus in lieu of tithe-hay was laid for every acre of grass, except on the lands which were tithe-free, and those for which tithes were paid in moieties: an objection was taken to the legality of the modus, because the defendant had not particularly set out the lands, which he stated to be exempt, or for which tithes were due in moieties; but this objection was also over-ruled (*r*). So where the defendants in their answer set up an immemorial payment due and payable by the owners or occupiers of lands, by way of modus, or com-

(*q*) Baker *v.* Athill, Gwill. 1423. 2 Anstr. 491. See also Atkyns *v.* Lord Willoughby de Brooke, Gwill. 1412. Anstr. 397.

(*r*) Gills *v.* Horrex, Gwill. 861.

position for the small tithes, it was contended that the modus was not set forth with sufficient certainty; it being pleaded as a modus, or composition; whereas the claim of exemption, being against common right, must be accurately defined: But the court, recognising the distinction, I have just alluded to, held, that if this had been a bill to establish the modus, the objection might have prevailed, but that in an answer, such strictness is not requisite; if it appear that there is a good defence, that is sufficient, [193] and therefore, disallowed the objection (*s*). So where to a bill for vicarial tithes the defendant in his answer set up a modus for an estate, of which he was owner, called H. without mentioning its extent, but which in the bill was stated to consist of two hundred acres, the manner of laying the modus was objected to for uncertainty; but the lord chief baron observed, that the object in stating the number of acres was to ascertain the land; that if it be ascertained by other means, the end is answered, and expressed his doubt of the validity of the objection; and although the other barons thought that the name did not give sufficient certainty, and that it was not supplied by the bill; yet the objection seems to have been considered as very critical, and the court permitted the answer to be amended (*t*). And where the answer set up a modus in lieu of all tithes, or at least of tithe-hay, for a place not described by metes and bounds, but by a map annexed to the answer, and the answer was objected to as being uncertain, the objection was over-ruled (*u*). Again, in a case, in which the defendant insisted on a modus without averring it to be immemorial, acknowledging that he did

(*s*) Atkyns *v.* Lord Willoughby de Brooke, Gwill. 1412. Anstr. 397.

(*t*) Vyse *v.* Dantze, Gwill. 1124.

(*u*) Clarke *v.* Jennings, 2 Anstr. 498. Gwill. 1424.

not know how long it had subsisted, and also omitting to state at what time it was payable, the court held the answer to be nevertheless sufficient (*v*).

The indulgence of the court to defendants in cases of this nature, is still more strongly evinced in the following instance: To a bill for tithes of apples, except ancient orchards, in respect to which the bill admitted a modus, the answer, which was very confused and indistinct, set out the copy of a paper-writing purporting to be an account of a modus in the parish, which the defendant stated he believed to be true, and added these words, "Cyder two-pence per hogshead." It was insisted on the part of the plaintiff, that it did not appear what [194] the modus was, which, even in an answer, ought to be set out with some degree of certainty, in order that the plaintiff may know on what the defendant relies, and how to apply his evidence; but Sir Thomas Clarke, M. R. held, that if it appear, that a pecuniary payment was made for any species of tithe, the court will help the imperfection in the manner of setting out the modus, and put a construction on the words. He accordingly directed an issue to try whether a modus of two-pence per hogshead of cyder was payable throughout the parish, in lieu and satisfaction of tithes in kind for the apples which were used in making such cyder (*w*).

And with the same liberality superfluous words used in an answer stating a modus, which would make it indefinite, have been considered by the court as expunged. Thus where a modus of three-pence per head for every sheep brought into the parish a short time before the 13th of

(*v*) Baker *v.* Athill, Gwill. 1423. Anstr. 491.

(*w*) Mallock *v.* Browse, Gwill. 905. Amb. 423.

February, was objected to as vague: It was held that these words should be rejected as unnecessary (*x*). Nor shall even a variation of the witnesses in the description of the land vitiate a modus, provided they agree in pointing out the particular land, which is covered by it (*y*).

But still this latitude permitted to answers is not wholly unlimited, for where the defendant insists on a parochial modus, he must state in his answer to whom, and when, or about what time, it is payable (*supra*, 124. 184. 190.) and what particular lands in his occupation are covered by it (*z*). So where in an answer a farm modus was laid for [195] all tithes, except those of corn and grain and the tithes due to the vicar, it was held not to be sufficiently certain for want of distinguishing what tithes the modus covered (*a*). So where the defendants in their answer admitted the rector to be entitled to tithes in kind, except in the township of Risby, which they stated to consist of nine hundred and thirty acres, or thereabouts, of which they alleged, 1, certain parts to be demesne of the manor or lordship of Risby, and to contain one hundred and fifty-six acres, or thereabouts; 2, other parts to be ancient enclosures, and to contain four hundred and thirty-two acres, or thereabouts; and, 3, the remainder to be three hundred and forty-two acres, or thereabouts, and insisted

(*x*) Ellis *v.* Saul, Gwill. 1326. 1335. Anstr. 332.

(*y*) Markham *v.* Huxley, Gwill. 1499. See also Austen *v.* Pigot, Cro. Eliz. 736. Gwill. 217. Real *v.* Webb, Cro. Eliz. 819. Gwill. 220. Taylor *v.* Walker, Bunb. 267. Gwill. 699. Laithes *v.* Christian, Gwill. 740. Williams *v.* Cullum, Gwill. 744. Harrington *v.* Horton, 1 Bro. P. C. 140. Gwill. 594. and infra, 257.

(*z*) Coggan *v.* Lord Lonsdale, Gwill. 1404.

(*a*) Nash *v.* Thorn, Gwill. 1324. See also Gumley *v.* Fontleroy, Bunb. 60. Gwill. 628. and Baker *v.* Planner, Bunb. 108. Gwill. 631.

on a modus, first for the demesne lands three pounds two shillings; for the ancient enclosures one pound ten shillings and three-pence; for all the land in Risby, accustomed to pay tithes in kind, twelve pounds; which amounting together to sixteen pounds ten shillings had been immemorially paid, after allowing the land-tax amounting sometimes to one pound, and sometimes to one pound four shillings, as a modus in lieu of all tithe within those several lands: The defendants not having in their answer ascertained the three different species of land, the court held, that it was impossible to direct issues on any of these moduses, though the court at the same time expressed a wish to relieve the defendants from the difficulty of having subjoined the third to the two others; but observed, that if a decree were pronounced for an account only of the third description, when the rector came for his tithes, his claim might be frustrated by the occupiers insisting, that these were demesne, or old enclosures; an account was therefore decreed of all the tithes demanded by the bill with costs; but without prejudice to any future claim to the benefit of the moduses defectively set forth in the answer (*b*). In like manner [196] to a bill for several species of tithes, and particularly for agistment, two of the defendants in their joint answer set up a modus to cover the agistment tithes, one of whom stated that he held as owner certain lands within that township of T., consisting of twenty acres or thereabouts, and alsoof seven beast gates, or cattle gates, in certain open pastures there called A. and B., together with common of pasture on the moors or commons within the township, which farm, lands, or grounds were part of an ancient estate within that township, which theretofore belonged to J. C.; that the other part thereof consisted of

(*b*) Croft v. Ayer, Gwill. 1325.

eleven acres of meadow land, or thereabouts, and three beast gates, or cattle gates, and that the last mentioned premises also belonged to the defendant, but during the said years were let out to tenants. The answer then set forth, that the defendant held as owner certain other lands there, consisting of twenty acres, or thereabouts, which were parcel of an ancient estate within the township, which, theretofore, belonged to W. A., the other part of which consisted of twenty acres, or thereabouts. The description of the lands held by the other defendant was similar, being parcel of another ancient estate. They then set forth certain moduses payable for those ancient estates respectively. There was evidence to shew the extent and boundaries of the several ancient estates. On its being objected on the part of the plaintiff, that the description of the places covered by the modus was not sufficiently certain, the court held, that although it be true, that in an answer considerable indulgence be shewn in stating the defence, and the evidence here made the case more intelligible, yet that the defendant must not give a blind description, which the plaintiff cannot meet; that the defendants had not defined with reasonable precision the ancient estates, with respect to which the se-
[197] veral moduses were claimed; that they had described the closes held by them no otherwise than as lands of certain extent: They had neither named the parcels, nor specified the boundaries; that the description of the ancient farms, of which these lands were parcels, was equally indefinite; they are stated merely to lie in some part of the township of T.; but there is no clue to discover their particular locality; whereas there ought to have been such a reasonable precision in their description as would enable a sheriff to give possession of the closes; but this description is clearly insufficient for that purpose. No issue could be directed upon this defence. The issue

is in general in the words, or nearly in the words of the answer; but here there is no description of the place covered by the modus: there is nothing, therefore, to try by an issue. Where there is an inaccuracy in the answer in describing the defence, an indorsement on the *postea* may remedy the error: here the description is totally wanting; an indorsement, therefore, could not assist the case (*c*).

II. A modus must in its origin have been beneficial to the parson, and not for the emolument merely of third persons.

Thus a modus to find straw for the body of the church is no valid modus in discharge of tithes, for the parson is not bound to find such straw, and consequently he derives no benefit from it (*d*). But if it had been alleged that the straw was given to him, and he bestowed it on the body of the church; or that he had a seat in the body of the church, the adjudication would have been different (*e*). So a modus to repair the church in dis- [198] charge of tithes is not good, because that is an advantage to the parish only; but to repair the chancel is a valid modus, because that is an advantage to the parson (*f*). So where a party prescribed, that he used to pay the parish-clerk his wages in satisfaction of tithe-hay, this was held to be no discharge (*g*); and upon the same principle, if a custom be insisted on in the spiritual court in

(*c*) Wood *v.* Wray, Gwill. 1157. Anstr. 838. See also Warren *v.* Fisher, Gwill. 1269. But see Foxcroft *v.* Paris, Gwill. 1529.

(*d*) Scory *v.* Baber, Gwill. 163.

(*e*) Ibid.

(*f*) 1 Roll. Abr. 649. pl. 50.

(*g*) Savell *v.* Wood, Gwill. 157. Cro. Eliz. 71. & Gwill. 163. Deg. p. 2. c. 16.

satisfaction of tithes, which gives no recompence to the parson, a prohibition shall not be granted (*h*).

III. A modus must be different from the article compounded for. It is absurd to suppose, that a part could ever be accepted as a satisfaction for the whole; therefore one load of hay in lieu of all tithe-hay, is no valid modus, for no parson would bonâ fide consent to receive a composition for less than is due of the same species of tithe, and therefore the law presumes it impossible for such composition to have been entered into (*i*). In like manner a certain number of sheaves of corn in satisfaction of all tithes of corn, has been determined to be a void prescription (*k*). So in a case where the defendant insisted, that a small meadow had always been enjoyed by the rector in lieu of the tithe of hay of another meadow of much larger extent, and it appeared that the first meadow produced every year on an average about four loads of hay, and the other about one hundred and fifty loads, the court disallowed the modus, observing that it could not be presumed, that any person in his senses would consent to take four [199] loads instead of fifteen (*l*). So, where a modus was alleged that tithe-milk ought to be paid by every tenth evening and morning's meal in kind, from Hoe Monday to the second day of November to commence upon the evening of Hoe Monday, (that is the Monday fortnight after Easter-day,) and the morning following to be taken by the rector at the place of milking, and no

(*h*) —— *v.* Barnes, Gwill. 285. Portingen *v.* Johnson, Gwill. 286. infra, 257.

(*i*) Lev. 179. See Fletcher *v.* Wilkinson, Gwill. 675.

(*k*) Sheppard *v.* Penrose, Lev. 179.

(*l*) Mason *v.* Holton, 3 Burn, Eccl. L. 421.

tithe-milk to be paid for the residue of the year; such alleged modus was held to be void upon the face of it, being only payment of part for the whole (*m*). So a custom, that the vicars had immemorially taken every tenth meal, or morning or night's milk, from all milch cows in the parish, from their first going upon the common, which happened usually on the third of May, for ten tithe meals, or turns of morning's and night's milk, in lieu of all tithe milk, was held void (*n*). But three eggs for every cock and drake payable on Wednesday before Easter, and for every hen and duck respectively three eggs in lieu of tithe-eggs, chickens, and ducks hatched in the parish, have been decided to be good moduses (*o*). So a prescription to pay the tenth cock of barley in discharge of the tithes of the rakings *minus voluntarie* (*p*) dispersed, has been established. And in no instance does this principle appear applicable to articles tithable merely by custom, but only to articles tithable *de jure*.

It is sufficiently obvious, that the cases I have above alluded to (*q*), in which the parson shall take less than a tenth of any specific article, having a compensation in the parishioner's work and labour, or in the greater maturity of the article, do not fall within this class of decisions. Therefore a custom to cut down the grass growing upon the meadows, and to make it into hay at the tenant's expence, and to set out the tenth cock, is a good prescription in satisfaction of the tithe of the latter mowth, as well as of the first mowth (*r*). So in case of a modus,

(*m*) Brinklow *v.* Edmunds, Gwill. 712. Bunb. 307.

(*n*) Somerville *v.* Wise, Gwill. 671.

(*o*) Brinklow *v.* Edmunds, Gwill. 712. Bunb. 307. supra, 147.

(*p*) Green *v.* Hun, Gwill. 215. Cro. Eliz. 702.

(*q*) Hall *v.* Fettyplace, Gwill. 222. Cro. Jac. 42.

(*r*) Supra, 63. 183.

that in consideration of the parishioners at their own costs and charges, making the tithe grass into hay, by strewing the grass upon the ground, which is called tedding it, and afterwards gathering it into weeks and windrows; therefore the parishioners and inhabitants within the parish were to pay no tithes for the herbage of dry and unprofitable cattle; the Lord Chancellor observed, that this might be a good modus to excuse the occupier of the same land, in which the parishioners made grass into hay, from paying tithe of after herbage; yet it could be no good modus to excuse the herbage-tithe of other land; for by parity of reason, a man might mow and make into hay a small parcel of ground containing about a quarter or half an acre of land, and by those means be excused from the tithe-herbage of a hundred head of cattle; and although in that case it was proved that the parishioners, time out of mind, had paid no tithe of dry herbage, yet on the other hand it was proved, that foreigners living out of the parish, and having no privilege of being tithe-free as to their herbage, made the tithe-grass into hay, as well as the inhabitants, and paid tithe-herbage; his lordship thought this a material objection to the custom, as it appeared to be the usage of the parish for the parishioners to make their grass into hay of course (*s*).

IV. Payment of one species of tithes cannot be discharged by a modus of another species of tithes. Thus a custom, that every parishioner should pay for every milch cow one penny by the year, and for every other cow a halfpenny per annum, in recompence and discharge of all tithes of cows, oxen, steers, and calves; and also, a penny for every mare, in discharge of all tithes of horses, mares, and colts there, has been adjudged bad, for tithes

(*s*) Fox v. Ayde, Gwill. 697. 2 P. Wms. 520.

paid for one thing cannot be intended as a recompence for the tithes of another, where tithe is of common [201] right due for both (*t*). In like manner, where a party prescribed to pay the tenth part of corn in the sheaf, for the tithes of all which is in the sheaf, and of all which is raked, the prescription was adjudged to be void, because he was liable to pay tithes of both (*u*). Upon the same principle, a modus of four-pence a year for every orchard, in lieu of the tithes of all fruit-trees in the parish, was over-ruled, as being a modus of one tithe in lieu of another (*v*). So a modus of four-pence for every hogshead of cyder, in lieu of all orchard fruit growing within the parish, was adjudged void (*w*). So a prescription to pay a penny for every milch cow, in satisfaction for the tithe of milch kine and beasts agisted, was held bad: But it would have been otherwise, if the party had prescribed, that he had paid a penny for all cows and beasts agisted (*x*).

V. The compensation must be as durable in its nature as the tithe discharged by it, because tithe in kind is a certain inheritance, and there is no colour of reason that the right to it should be extinguished by a less permanent recompence; therefore, a modus that every inhabitant of a house shall pay four-pence a year, in satisfaction of the owner's tithes, is no good modus, for possibly the house may become dilapidated, or be without an occupier (*y*). A modus likewise for the tithe of articles of comparatively recent introduction into England, as

(*t*) Grysman *v.* Lewes, Gwill. 165. Cro. Eliz. 446. Morton *v.* Briggs, 2 Lutw. 1037. Gwill. 561.

(*u*) Sir Charles Norrison's case, *ibid.*

(*v*) Torriano *v.* Legge, Gwill. 909.

(*w*) Edgerton *v.* Follett, Gwill. 535.

(*x*) Sherington *v.* Fleetwood, Cro. Eliz. 475. Gwill. 189.

(*y*) Gibs. 675. Cro. Eliz. 139. Carleton *v.* Brightwell, 2 P. Wms. 462.

turkies, hops, and whatever is in the same predicament, cannot be a valid modus, for want of a sufficient duration (*z*).

But to a bill for tithes in kind of certain farms within the parish of K. the defendants as to those farms set up the following moduses; as to two of the farms, a modus of ten fleeces of wool, and two and a half lambs, or one [202] shilling and sixpence in money in lieu of the half lamb, in full discharge of all tithes whatsoever; as to two other farms, a modus of six fleeces of wool, and three lambs for all small tithes; and as to a fifth farm, a modus of eight fleeces of wool, and four shillings in money in discharge of all tithes whatsoever for that farm. As to the first and second moduses, Price and Bury, barons, were of opinion they were bad. Ward, chief baron, and Smith baron, on the contrary, held, that they were valid, for that they were not in discharge of wool and lamb only, and that any thing of a tithable nature may be given in discharge of tithes, as well as money; that the distinction is, where it is in discharge of a species of tithes, and where of the land; that it is clear that the payment of tithe of one kind could not be a discharge in respect to the tithe of another kind; but they observed, that this was not a payment of tithe, because it was to be paid in all events, whether there were sheep, or not. In respect to the last modus, it was holden good by the chief baron and two of the barons, the third dissentient (*a*).

Lastly, the modus must not be too large, or, as it is styled, a rank modus; for in these instances of custom,

(*z*) Wats. C. L. 408. See Chapman *v.* Smith, Gwill. 847. 2 Ves. 506. Brinklow *v.* Edmunds, Gwill. 712. Supra, 146.

(*a*) Archbishop of York *v.* Duke of Newcastle, Gwill. 583.

or prescription, the law supposes, as I have already intimated, an original real composition to have been regularly entered into; but having been lost by lapse of time, immemorial usage is admitted as evidence of its having formerly existed, and that from such composition such usage was derived. Now the commencement of time of memory, as above stated, hath been long fixed, from the time of the expedition of king Richard the first to the holy land (*b*). Any custom may, therefore, be destroyed by proof of its non-existence in any part of the long period from that time to the present; consequently, as this real com- [203] position is supposed to be a fair and reasonable contract, amounting to the full value of the tithes at the time of making it, if the modus insisted upon be so rank and large as palpably to exceed the value of the tithes as it existed at the time of Richard the first, it destroys itself (*infra*, 208,) for as it would be disallowed on direct proof of its non-existence, at any time subsequent to that æra, it is of necessity avoided by such internal evidence of a much later origin (*c*).

The rankness, therefore, of a modus depends on the history of money, and involves in it a question of fact, and not of law; a question nevertheless, which hath frequently been decided by a court of equity without the intervention of a jury: for if a modus be palpably and notoriously of that description, and bear strong intrinsic evidence against the possibility of its immemorial existence (*d*), it were nugatory, and indeed oppressive for the court to direct an

(*b*) See Chapman *v.* Smith, Gwill. 853.

(*c*) 2 Bl. Com. 30, 31. See Gwill. 807, 808.

(*d*) Pike *v.* Dowling, Gwill. 1166. 2 Bl. Rep. 1257. See also Loveday *v.* Moorer, Gwill. 626. Travis *v.* Oxton, Gwill. 1092. and Haywood *v.* Nicholls, Gwill. 1120.

issue to try a fact, of which it is perfectly satisfied (*e*). Thus in a case, in which the defendants insisted on several moduses for all small tithes arising out of their respective farms, it appearing upon the face of their answer, that their small tithes in kind in the year, demanded by the bill, did not amount to more in that year, than the alleged moduses, they were at the hearing set aside (*f*).

So Lord Hardwicke C. on a similar occasion declared, that he should be ashamed to send a modus of thirty [204] pounds per annum to be tried by a jury, where the real value of the tithes was not above sixty pounds, and decreed for the plaintiff, the parson, with costs (*g*).

But the doctrine that the court is bound to take cognisance of the rankness of a modus, and ought in the first instance to over-rule it, has prevailed principally with reference to the value of particular things, for which the modus has been set up; as where a specific sum of money is payable for a sheep, or lamb, or any particular species of produce, the present value of which may be easily ascertained: such moduses are distinguishable from those, the validity of which depends on the value of lands, a more complicated consideration varying by different means, by the fluctuations of traffic and commerce, by improvements in the modes of cultivating lands, by their accidental rise or depreciation, and by a variety of other circumstances, which render such moduses more uncertain, and consequently more fit subjects for the investigation of a

(*e*) Bishop *v.* Chichester, Gwill. jun. 665.
1320. Bedford *v.* Sambell, Gwill. 1056. Twells *v.* Welby, Gwill. 1192. vid. Ashby *v.* Power, Gwill. 1238. O'Connor *v.* Cook, 6 Ves.

(*f*) Lloyd *v.* Small, Gwill. 619. 3 Burn, Eccl. l. 425, 426.

(*g*) Moore *v.* Beckford, cited 2 Bl. Rep. 1257.

jury (*h*). So in the case of a farm modus, Macdonald, C. B. recognised the distinction between a farm payment, and one for a particular species of produce, and his lordship observed that in the former many reasons may have prevented tithes from being agreed for at their proper price. The owner may have meant a bounty to the clergyman, or he may have wished to pay for an exemption from tithes for the sake of improvements. That it is, moreover, scarcely possible to ascertain the comparative value of the land, or of the produce in former times, and the court should not be nice in judging of the value, or of the goodness of the bargain, where by any probable circumstances the modus may have been a real agreement between the parties before time of memory; more [205] especially ought the court to be extremely cautious in deciding such a question without the intervention of a jury, if the least doubt arise as to the fact of rankness; under these circumstances, the court would not decree for the plaintiff against the modus; but held that, if the rector desired an issue, undoubtedly he must have it (*i*).

And in a recent case, where a modus for certain lands was insisted on, amounting to one shilling an acre, and it was objected to on the ground of its rankness, which it was urged was so evident, that if the court sent it to a jury, the principle would be universally established, that the court can in no case decide without an issue: it was further argued, that from acts of parliament, and many other documents of which the courts can take notice judi-

(*h*) Chapman *v.* Smith, Gwill. 847. 2 Ves. 506.

(*i*) Atkyns *v.* Lord Willoughby de Brooke, Gwill. 1412. See also Pole *v.* Gardiner, 1 Bro. P. C. 214. Chamberlain *v.* Spencer, Bunb. 238. Gwill. 712. Sweetapple *v.* Duke of Kingston, Gwill. 712. Archbishop of York *v.* Stapleton, 2 Atk. 136. Gwill. 774. Bree *v.* Chaplin, Gwill. 1033. See also O'Connor *v.* Cook, 6 Ves. jun. 665.

cially, they can judge of the rankness, and where it is most clearly apparent, may determine upon it; that in the fourteenth century, the statute of Edward III., and other statutes fix the average price of the quarter of wheat at six shillings and eight-pence; but that carrying it three hundred years farther back it will be found, that the quarter of wheat was at two shillings only, which would make the modus in question much exceed the value of the land; yet, Lord Eldon, C. directed an issue, observing, that though undoubtedly, according to the constitution of the court, it might take to itself the decision of every fact put in issue upon the record, yet as to an immemorial payment, if any reasonable doubt has been raised upon it in the evidence, courts have of late judged it more discreet to send the question of fact to a jury, and will not suppose that there is any prejudice in a tribunal appointed [206] according to the constitution of the country to try the fact. Rankness is merely evidence against the payment having been immemorial, and forms no legal objection to the modus. If it can be inferred, that it has existed, the inequality of the payment cannot impeach it; and therefore the judges in the case in Blackstone certified, that two shillings and sixpence was not an illegal payment for a lamb. That there is an evident distinction in respect to rankness between a modus for tithe of particular things, and a farm modus; for that it is perfectly easy, in almost every period of our history, to ascertain what, for instance, a lamb was worth, and therefore to conjecture upon what, in any place, parties would agree. But what is the value of land in a particular parish, and what therefore it is proper to give per acre, is a very complicated consideration. That though the court cannot but entertain a strong opinion, that one shilling an acre was, on the principle of rankness, in all probability a monstrous payment, yet still the judges have thought, that

even such payments ought to go to trial, and verdicts under which, in many cases, even more than one shilling an acre has been claimed, have been confirmed. That the modus in question is nothing more than one shilling an acre for all tithes of the farm, in whatever form cultivated, or occupied; not for agistment, milk, lamb, or any other particular tithe. That there was no evidence before the court shewing, that this modus may not be proved to be as reasonable a commutation for tithes, even put so distributively, and not as a farm modus, as in some of those cases, where one shilling an acre has been given, even for tithe of hay alone (*k*).

To illustrate this species of objection to a modus, [207] it will be proper to specify various instances, in which it hath been allowed to prevail, or has been over-ruled.

A modus of five shillings an acre for wheat and rye; four shillings an acre for summer corn; three shillings an acre for meadow; twenty-four shillings a year payable in lieu of the tithes of a whole farm; five shillings an acre for wheat; two shillings and sixpence for other grain; two shillings and sixpence for meadows mown; one shilling and four-pence for upland grass grounds; and two shillings and sixpence for every farrow of pigs (*l*); a

(*k*) O'Connor *v.* Cook, 6 Ves. jun. 665. & 8 Ves. jun. 535. A verdict was found for the plaintiff in the issue, the defendant in equity, establishing the modus; and a motion was afterwards made for a new trial, on the grounds of misdirection of the judge, and new evidence since discovered. A new trial was granted, on which there was again a verdict for the plaintiff. See also 9 Ves. jun. 168.

(*l*) Torriano *v.* Legge, Gwill. 909, 910. notis. & 1 Bl. Rep. 420. Benson *v.* Watkins, Gwill. 612. Bunb. 10. Loveday *v.* Moore, Gwill. 626.

modus of two shillings an acre, in lieu of the tithe of all grain reaped from the enclosed arable land in a hamlet; and one shilling and sixpence an acre, on the common field arable lands (*m*); a modus of four pounds ten shillings a year for a farm of the yearly value of thirty pounds (*n*); one shilling an acre for hay (*o*); two-pence a mower, or man's math, and so in proportion for any other quantity of a certain meadow, in lieu of all the tithes of hay thereof (*p*); four shillings for every acre of wheat; and two shillings for every acre of lent corn reaped (*q*); a modus of two shillings and sixpence an acre for corn lands (*r*); four shillings for every ten lambs fattened; two shillings for every five: four-pence a piece for all *under* five; and for all *above* five, and under ten, four-pence a piece on the shearing-day; and three-pence a piece for all other lambs bred in the parish [208] in lieu of the tithes of such lambs (*s*); twelve-pence for a milch-cow, and sixpence for every calf killed and sold (*s*); three-pence for every lamb yeaned within the parish (*t*); four-pence for every barren beast sold, or removed, in lieu of the agistment-tithe thereof, provided such beast was above a year old, and had been agisted on the land above one month, but not otherwise (*u*); have been all adjudged to be rank, and

(*m*) Gale *v.* Carpenter, Gwill. 945.

(*n*) Kennedy *v.* Goodwin, Gwill. 708. Bunb. 301.

(*o*) Bate *v.* Hodges, Gwill. 645. Bunb. 125.

(*p*) Somerville *v.* Wise, Gwill. 671.

(*q*) Hulse *v.* Munk, Gwill. 960.

(*r*) Bishop *v.* Chichester, Gwill. 1323.

(*s*) Wood *v.* Harrison, Gwill. 970. Franklyn *v.* The Master and Brethren of St. Cross, Gwill. 629. Bunb. 78. See also Turner *v.* Weedon, Gwill. 524.

(*t*) Goddard *v.* Keble, Gwill. 631. Bunb. 105. & vid. Bishop *v.* Chichester, Gwill. 1320.

(*u*) Bateman *v.* Aistroppe, Gwill. 1048.

consequently void. So a modus of forty-eight pounds a year, in lieu of all tithes of a manor worth only eighty pounds a year, was held rank, since according to the natural improvement of land, from the time of king Henry the eighth, it ought to have been ten times as much, on account of money sinking in its value, and lands rising in theirs (*w*).

The principle of these decisions is this: that the value of money being much higher at the time when all moduses are presumed to have commenced, than it is at present, a modus approaching to the value of the tithes at this day, must at that period have greatly exceeded it; and it were absurd to suppose, that the parishioners would at any time have agreed to a substitution for these articles, so much more valuable than the articles themselves.

On the other hand, a modus that every occupier of lands within the parish having a lamb yeaned within the same, ought to pay to the rector, or his lessee, for every lamb so yeaned, the sum of three-pence and no more, in satisfaction of the tithe of every such lamb, and that the same was payable yearly on St. Mark's-day, or so soon after as demanded, was objected to, as a rank modus, on the ground, that in ancient times, and long within the time of legal memory, the price of cattle, and other commodities, was so much lower than at present; that a lamb [209] which now may be worth two shillings and sixpence, two hundred years ago, would not have been worth more than sixpence, or in such proportion, that the sum of three-pence insisted on to have been anciently and immemorially paid in lieu of every lamb, which sets the price of every lamb at two shillings and sixpence, is so near the value of

(*w*) Ekin *v.* Pigot, Gwill. 783. 3 Atk. 298. Vid. infra, 211.

such tithes, even at this day, that it proved itself to be a modern composition only; the court of exchequer, nevertheless, was of opinion, that the objection arising upon a matter of fact was very proper to be considered by a jury, who would enquire into the value of lambs in the place, where this controversy arose: and the court pronounced a decree to that effect, which on an appeal was affirmed by the house of lords (*x*). So a modus of nine-pence an acre of marsh land, except when sown with corn, or planted with hops, was sent by the lord Chancellor to be tried at law (*y*).

In respect to such moduses as have been adjudged valid, they are of the following description: Sixpence for every cow depastured within the parish, payable at Michaelmas, in lieu of tithes of milk, and calves; two-pence for every lamb yeaned within the parish, in lieu of tithe thereof; one penny for every fleece of wool shorn from every sheep fed, and depastured in such parish, in lieu of the tithe of such wool; two-pence for every colt foaled; four-pence for every garden, in lieu of garden-stuff; four-pence for potatoes tilled in a ridge in the field for family use, and not for sale; pigs, and geese in kind, except under ten, and then one penny a pig, and one penny halfpenny a [210] goose (*z*); a modus of one halfpenny payable on shear-day for the wool of each sheep dying between Candlemas and shear-day (*a*); four-pence a month payable on shear-day for the tithe of wool of every hundred sheep shorn in the parish (*b*); a modus of a garden-penny yearly,

(*x*) Webb *v.* Giffard, Gwill. 708. and 4 Bro. P. C. 212. See also Layfield *v.* Enticknapp, Gwill. 560.

(*y*) Chapman *v.* Smith, Gwill. 847. 2 Ves. 506.

(*z*) Boscawen *v.* Roberts, Gwill. 946.

(*a*) Brinklow *v.* Edmunds, Gwill. 711. Bunb. 307.

(*b*) Ibid.

for all vegetables and fruit, except apples and pears (*c*); a modus of a garden-penny for the produce of the garden generally (*d*); five-pence a pipe for all fruit made into cyder, and so after that rate for a greater or less quantity (*e*); one penny for every milch cow kept and depastured in the parish at Easter yearly, in lieu of the tithe milk of such cow (*f*); two-pence for every new milch cow, and one penny halfpenny for every old milch cow fed in the common fields, in lieu of the tithe milk of the same (*g*); one halfpenny for every lamb; eight-pence a score for sheep wintered in other parishes, in lieu of tithe of wool (*h*); one penny for all tithe-wood cut on the common and burnt in the family (*i*); one penny halfpenny for every calf weaned (*k*); a modus of eight-pence for every cow, and four-pence for every heifer, in lieu of the tithe of milk, and calves of such cow, and heifer (*l*); three shillings and four-pence payable for every score of sheep shorn out of the parish, and so proportionally for a less number than twenty, or for a less time than a year; for the wool and lamb of such sheep (*m*); a modus of one shilling for each day's math (*n*); a modus of nine carts of logwood, (*supra*, 188,) or an hogshead of cyder (*o*) in lieu of all tithes (*p*); twelve-pence an acre for low meadows, and eight-pence an acre for high meadows in lieu of tithe-

(*c*) Thompson *v.* Holt, Gwill. 671.

(*d*) Philips *v.* Symes, Gwill. 654. Bunb. 171. Colchester *v.* Russell, Gwill. 741.

(*e*) Colchester *v.* Russell, Gwill. 741.

(*f*) Ibid.

(*g*) Thompson *v.* Holt, Gwill. 671.

(*h*) Ibid.

(*i*) Thompson *v.* Holt, Gwill. 672. 711.

(*k*) Ibid. 671.

(*l*) Ibid. Philips *v.* Symes, 654.

(*m*) Ibid. & see Gibb *v.* Goodman, Bunb. 328. Gwill. 735.

(*n*) Markham *v.* Huxley, Gwill. 1499.

(*o*) Woolferston *v.* Mainwaring, Gwill. 679. Bunb. 279.

(*p*) Ibid.

hay (*q*); a modus of one penny at Easter annually, in [211] lieu of the tithe hay growing on the premises (*r*); a modus of twenty-six shillings and eight-pence for hay, small tithes, and Easter offerings (*s*); ten-pence for every acre of meadow or pasture yearly, and so in proportion for any quantity of such meadow or pasture less than an acre, in lieu of all manner of tithes arising on the same, payable by persons occupying meadow or pasture land in the parish, but not residing within it (*t*); a modus of eight pounds for a farm of eighty pounds a year (*u*); one penny per head for sheep brought into the parish after Candlemas, and clipt in the parish in lieu of tithe-wool (*v*); three-pence per head for sheep brought into the parish before Candlemas, and carried out before shearing time, as an average payment for the wool carried out upon their backs (*w*); and such payment may be applicable to the wool tithe, although not then due (*x*); a modus to pay a hearth-penny for all combustible wood (*y*); a modus for a lord of a manor to pay six pounds in satisfaction of all tithes in the manor, and in consideration of such payment to take the tenth shock, &c. (*z*).

A modus for persons occupying lands in the parish, but residing out of it, to pay four-pence an acre for the tithe of hay, and the herbage of pasture lands occupied by them in the parish (*a*), has also been held good, since the

(*q*) Pole *v.* Gardiner, Gwill. 601. 1 Bro. P. C. 214.

(*r*) Finch *v.* Masters, Gwill. 652. Bunb. 161.

(*s*) Ibid.

(*t*) Sansum *v.* Shaw, Gwill. 806.

(*u*) Edge *v.* Oglander, Gwill. 536. Bunb. 301. Vid. supra, 208.

(*v*) Ellis *v.* Saul, Gwill. 1326. 1334. 1 Anstr. Rep. 332.

(*w*) Ibid.

(*x*) Ibid.

(*y*) Green *v.* Hun, Gwill. 215. Cro. El. 702.

(*z*) Pigot *v.* Heron, Gwill. 200. 2 Moore, 483.

(*a*) Chapman *v.* Bishop of Lincoln, Gwill. 679. Mos. Rep. 266. 279.

parson has no reason to object, that the modus was not more extensive, that it did not cover all the land in the parish, whether occupied by inhabitants, or such as were not inhabitants; for that had been more to the prejudice of the parson, who in the principal case had tithes in kind of the inhabitants for their land; and as a modus for paying four-pence per acre for all the land in the parish, whether occupied by the inhabitants, or not, had been good, a portion of this modus is good, because more beneficial to the parson: and it is certain, because he is always sure of having either his four-pence per acre, or, what is better, his tithes in kind. So a custom that every inhabitant of Sale, who occupied pasture lands in Dale, had immemorially paid tithes for these pasture lands to the vicar of Sale, and that the vicar paid two-pence for every acre to the parson of Dale, was held a good custom, though it depended on the uncertainty of an inhabitancy, and that the vicar of Sale's paying two-pence per acre to the parson of the other parish for this pasture, was the same thing as if this composition were paid by the occupier of the land itself, being equally beneficial to the parson (*b*).

Such is the general nature of a modus (see *supra*, [135] 140.); and such are the properties, which are necessary to constitute its validity.

But notwithstanding these requisites are indispensable, and the rights of the church shall not be impaired by any customary payments, unless sanctioned by the rules of law (*c*), a modus being presumed to be a composition in writing with the consent of the parson, patron, [212]

(*b*) Coltford *v.* Pearse, Cro. Eliz. 136.

(*c*) 2 Ves. 506.

and ordinary before time of memory, decayed indeed, or lost by accident, yet having grown into a prescription, shall be allowed, though it may not, in every respect, appear a wise provision for the interests of the parties, it shall not be narrowly and strictly canvassed; the courts on principles of public policy being averse from intrenching upon such ancient usages for slight reasons: purchasers buy lands upon the faith of such moduses, and are induced to give a greater or less price for the lands, according to the nature and value of the modus, by which they are covered. The vendor proceeds upon the same confidence; the parson accepts his living with the expectation of these payments; and in contemplation of them the lay impropriator purchases: it would, therefore, be unreasonable to overturn moduses upon trivial grounds, and by these means to deceive purchasers, who bought the land with a view of paying no more than the modus, and to give the lay impropriator an undue advantage by suffering him to take the tithes in specie, for which he never stipulated (*d*): Thus, although ordinarily the occupier of lands be answerable for the payment, yet a modus payable by the owner of the lands is valid: As where to such a modus it was objected, that it was unreasonable, inasmuch as the parson was under the necessity of seeking for the party to pay him his modus, instead of claiming from the tenant either the modus, or tithes in kind; yet the court held, that this might be a fair agreement at the time of the commencement before memory, when the ownership of land was not subject to such fluctuation as it is at present, and that the parson might have thought it more advan-

(*d*) Hardcastle *v.* Sclater, Gwill. 788. See also Ekin *v.* Pigot, 3 Atk. 298. Gwill. 783. Harrington, *v.* Horton, 1 Br. P. C. 140. Gwill. 594. and Sansum *v.* Shaw, Gwill. 806. Chapman *v.* Monson, 2 P. Wms. 573. Gwill. 679.

tageous to have the landlord a security rather than a tenant in doubtful circumstances, and that the court ought [213] not nicely to weigh the validity of that judgment (*e*). So a modus that the occupiers of lands and tenements within certain vills, within the parish of C. not being parcel of the demesnes or granges of the monastery of C., shall pay several sums; that is, so much in certain for each vill in lieu and satisfaction of tithes of hay growing within the vills, it was insisted, that this modus was void upon the face of it: for that it was unreasonable that any one occupier should be liable for all the tithes of all the rest; and that it also was uncertain who was the person to pay, for there might be several occupiers in one year; but the court decided this to be a good modus, since it must be presumed, that at the time of entering into this agreement, one person was owner of a whole vill, and that consequently by the branching it out afterwards, and dividing it into several, the parties could not destroy that modus, which was originally, and in its commencement good. Nor does it seem necessary, that the parson should make every one of the occupiers a party to a suit for this modus, because as it affects all the lands, each occupier is liable for the whole, and they are entitled to a contribution among themselves (*f*). So where there was a waste between two vills, N. S. and S. S., and the resiants and occupants of each vill have had common by reason of vicinage, a custom, that if any inhabitant of S. S. have any pasture ground in N. S. for cattle, which go on the waste, then he shall pay tithes to the parson of S. S. where he inhabits, and that in consideration thereof, the rector of S. S. shall pay to the parson of N. S. four shillings, and to the vicar eight shillings; and that the

(*e*) Ord *v.* Clarke, Gwill. 1437. Anstr. 638.

(*f*) Hardcastle *v.* Sclater, Gwill. 784.

party inhabiting within his parish shall be discharged of [214] tithes against the parson of N. S.: though it was objected that it was not equal, it being unreasonable, that the parson of S. S. should have all the tithes of lands of N. S. paying to the parson four shillings per annum, and that the parson of N. S. should not have the same privileges in the lands of S. S., and that by law no parson is to have tithes, but of lands in his own parish; yet it was held, that though the custom were hard, yet being found by the verdict, the court could not interfere; that there was a recompence, such as it was, given to the parson of N. S., and though not given by the parties themselves, yet it was given by the parson of S. S., which is in effect the same (*g*).

A lay person may also prescribe for tithes arising on his own estate; thus a prescription, that the defendant and all those whose estate he had immemorially paid to the rector of the rectory and chapelry for the time being, four pounds yearly, as a pension or payment in satisfaction of all tithes arising on the said estate; and, that he and all those whose estate he held immemorially in respect of the pension so paid, had the tithe of all corn, grain, and hay arising on the said estate, was held good in point of law; though it was objected that if any agreement were made between a rector and land-holder, that a gross sum or annual payment should be made to him, and that the tithes should for ever after belong to the land-owner, the land would by such means become discharged of the tithe, and the tithe would from that time cease to exist; the court adopting the reasoning in Piggot *v.* Sympson, that it shall be intended that at the beginning the lord had all in his hands, and then might

(*g*) Hickes *v.* Froud, Gwill. 267.

prescribe to pay a sum in discharge of all the tithes, and that when he gave the tenancies to hold of him, and always after to have the tithes of these lands, it is a very reasonable prescription, for now he hath no more than what he had before, for he had them before by retainer, and now he takes the tithes themselves. Hence it appears that two species of prescriptive rights may be asserted, first, to retain the tithes so long as the land remained in the original owner; secondly, to receive them after the lands were granted out. The tithes, therefore, are, in such case, considered as existing always distinct from the land (*h*).

On the other hand, where a modus was insisted on of one penny, payable to the rector annually, at Easter, by the owners, and occupiers of ancient tenements having right of common on S. common, in respect to which ancient tenements the lands occupied by the defendant were set out, or allotted, as a modus for the tithes of grass arising either on the ancient estate, or common in right thereof, whether such common should be divided, or allotted, or permitted to continue undivided or unallotted, and whether the grass be cut and made into hay, or whether it be eaten by barren or unprofitable cattle; the modus was held to be void upon the face of it; the court observing, that it did not appear that any agreement was made with the rector, at the time of the inclosure, respecting the payment of any modus for tithes, or for saving the rights of the owners of the farms over the lands when they should be inclosed, and that without some agreement it might be a question, whether the modus was not extinguished by the inclosure? But supposing that by usage antecedent to the inclosure, a modus of one

(*h*) Philips *v.* Prytherick, Gwill. 1125.

penny had been paid for the farms and the commons, it could not have been paid for hay on the commons, for the commons from the nature of them, and of the rights over them, could not have produced hay. Such a usage could not have afforded a presumption of any ancient agreement on the part of the rector to receive, and on the part of the owners of the farms to pay an annual sum in lieu of the tithe of a tithable matter, which at the time of making it could not have been in the contemplation of either of the parties, as the subject of their agreement, and over which one of the parties had no right. For supposing the ancient rights of the owners of the farms to have continued after the inclosure, yet the right of the owners of the farms could not before the inclosure be extended to any exemption from payment of tithe of hay, because if hay had been produced on any part of the common, it would not have belonged to the owners of the farms, who paid the modus, but to the owner of the land on which it grew, who was the lord of the waste (*i*).

A parochial modus may extend to lands recently inclosed, but it is otherwise with regard to a farm modus (*j*).

It remains now to be considered how a modus may be discharged (*k*), and tithes may become due and payable in kind.

A modus may be discharged by the destruction, or alteration of the subject, for which the modus was payable;

(*i*) Scott *v.* Fenwick, Gwill. 1323. Vid. supr. 184. 184. 194. 1250.

(*j*) Bishop *v.* Chichester, Gwill.

(*k*) Vid. supr. 53, 54.

as where the prescription is for hay, and grass of any particular quantity of land, if the land be converted [216] into a hop garden, or tillage, the prescription is gone (*l*). Thus, as I have had occasion in a former part of this work to state (*m*), a modus for a mill, when it was partly a corn-mill, and partly a fulling mill, in consequence of the fulling wheels being taken away, and two mill-stones substituted in their room, was held to be discharged, on the ground that what had been done was equivalent to the erection of two new corn-mills (*n*). So if there be an ancient mill under a building worked with one wheel, and the owner, under the same roof, erect two new wheels, and two new stones, this constitutes it in all respects two mills, and he cannot cover them by the same modus; he might as well erect another mill on the same stream, and call them both but one mill. The principle upon which it is decided that a modus is destroyed where two stones are erected instead of one, is, because the miller is thus enabled to grind a double quantity (*o*). So where a water course was altered by the owner of a mill, and the mill pulled down by him, and rebuilt upon it, it was adjudged that the modus was extinguished (*p*). So where there is a prescription to be discharged of all tithes by delivering deer out of a park annually, and the park is disparked, the prescription is destroyed (*q*). But where a mill had originally only two pair of stones, and a third pair had been added, the whole

(*l*) 2 Inst. 490. 1 Roll. Abr. 651.

(*m*) Supra, 47.

(*n*) Talbot *v.* May, Gwill. 782. 3 Atk. 17.

(*o*) Ibid.

(*p*) 1 Roll. Abr. 652.

(*q*) Hutton, 53. See Gwill. 908. & supra, 153. But see Cowper *v.* Andrews, Gwill. 275. Moore, 683, in which the question was, whether a modus for a park of 2*s.* a year and a shoulder of every third deer killed in it, was determined by disparking; on which the court was equally divided.

being carried by the original frame and wheels, and the mill being incapable of working more than two pair of stones at one time; a modus for the mill was nevertheless established (*r*). So if the modus cover the land, and the mill is merely an accidental quality, the destruction or alteration of the mill, does not amount to a discharge of the modus (*s*). In like manner, where a party was seised of lands, for the tithes of which he had immemorially paid five shillings and fourpence, and he built a corn-mill upon the same, it was adjudged he should pay no tithes for the corn-mill, because the lands were discharged from the modus (*t*). So where there was a modus for lands contained in a park, which belonged to one person originally, and was afterwards disparked, and divided out among several persons, that was held not to destroy the modus, for the prescription went to the land, and not to the park; consequently, as it was a modus in respect of the land, it was not destroyed by dividing the land (*u*). So where forty-eight acres of common lands were subject to a modus, and an agreement was entered into between the defendant, and the parson, and those who had a right to feed upon the common, to make an inclosure, and an act of parliament was passed for that purpose, by which it was provided, that they should enjoy all their rights in severalty, as they did the right of common before; these forty-eight acres being allotted to the defendant in lieu of common, they were held to be still covered by the modus; for although the recital in the act used only general words, yet it shewed plainly the intention of the legislature to have been, that every person

(*r*) Goodwin v. Wortley, Gwill. 715.
(*s*) Talbot v. May, Gwill. 782.
3 Atk. 17.
(*t*) 1 Roll. Abr. 652.
(*u*) See Gwill. 786.

should enjoy his allotment, in the same way as he did the subject in lieu of which it was made, and that was liable to the modus (*v*).

But in a case, in which the owners of a certain demesne claimed the benefit of a modus in lieu of tithe of corn, grain, and hay, and by an act of parliament a common was inclosed, and ninety acres allotted to the owners of that demesne, a clause in the act that the divided lands before parcel of the common, should be holden by each person, to whom the respective divisions were allotted, subject to the same charges and incumbrances as their own former land, to which they are allotted, and consolidated, were before subject; and also a clause that the act should be construed beneficially to the land owners to whom the respective divisions were allotted, were held not to extend the modus to the allotted lands; the court being of opinion, that this case was clearly distinguishable from the case I have just cited, since the demand of the impropriator in the principal case was of the tithe of corn, grain, and hay. But corn, grain, and hay could not be part of what grew on a common; the tithes, that arose upon the common, could only have been tithes of agistment, or of lambs, calves, wool, milk, and other species of tithes, which could have been the produce of a common; that, therefore, the exemption could not relate to any other but such specific tithes, and was not comprehended within the substantial idea of a modus or compensation insisted on by way of exemption from payment of tithes, for those lands, which were part of the common, but which then produced corn, grain, and hay; for the rector could have no benefit from this modus, which was confined to the tithe of corn, grain, and hay, in respect of any species

(*v*) Stockwell *v.* Terry, Gwill. 823. 1 Ves. 115.

of tithe which could arise from the common, while it remained common. In short, that the decision in this case rested on the same principle as the decree in the case last cited, that what was before exempted should continue exempted, and what was before not exempted should pay tithe (*w*).

A modus shall not be affected by a modern temporary interruption, as for example by not having been yielded or paid for twenty years (*x*). So if there be a modus for hay in Blackacre, and the occupier sow such acre seven years together with corn, this shall not destroy the modus, but it shall continue when the acre is made into hay. So if the vicar be endowed of tithes of hay, the same close when kept as meadow, and mown, shall pay tithes to the vicar, and when sown with corn shall pay tithes of corn to the parson; consequently it is not necessary that the same land should always pay a modus, but it may sometimes pay tithes in kind, and sometimes a modus, and yet the modus subsist (*y*).

Nor does unity of possession destroy a modus; thus in a case, in which a prescription was alleged, that the queen, and all those whose estate she hath, had used to pay to the rector of Kingswood two shillings and four-pence yearly, in satisfaction of all the tithes of certain land in Kingswood; and it appeared in evidence, that the queen had the estate of the abbot of Kingswood, who was owner of the land, and rector in fee in right of his abbey, whence it was inferred that the prescription was void; inasmuch as the abbot could not pay himself, nor could the queen,

(*w*) Moncaster *v.* Watson, Gwill. 905. 3 Burr. 1375.

(*x*) Newell *v.* Hicks, 2 Inst. 653. Gwill. 1570.

(*y*) Brown's case, Godb. 194. cited 2 P. Wms. 570

who has now the estate of the abbot; but that the prescription ought to have been stated, that when the queen demised the land, the occupier had used to pay the modus; the court were clearly of opinion, that unity of possession is not a perpetual discharge of the tithes, nor of the recompence in lieu of them, and consequently that the retainer might be regarded in the light of a payment to himself (*z*).

The next species of partial exemptions to be considered are compositions real.

A real composition is when an agreement is made between the owners of land, and the parson or vicar, with the consent of the patron and ordinary, that such lands shall be exempt from the payment of tithes, in consideration of some land, or *real* recompence allotted to [220] the parson in lieu, and satisfaction of them: It does not mean every substantial permanent security for the payment of the composition; but *land substituted* in lieu of tithes; or *a rent charge issuing out of land* (*a*); or *a composition of an annual sum out of the profits of a manor;* for though in the last instance, it was insisted, that the composition was void upon the face of it, since the payment was not to arise from the manor or park, but from the profits of the manor, and that eventually there might be no profits, and the composition was therefore bad in respect to the precariousness of the recompence; yet the court established it (*b*).

This species of agreement was allowed by the law on

(*z*) Chambers *v.* Hanbury, Gwill. 208. Moore, 527.

(*a*) Attorney General *v.* Bowles, Gwill. 109. 3 Atk. 809. 1397. 2 Anstr. 372.

(*b*) Sawbridge *v.* Benton, Gwill.

the principle, that the clergy were not likely to be prejudiced by such composition, since the consent of the ordinary, whose duty it is to guard the rights of the church in general, and of the patron, whose interest it is to protect that particular church, were both made essential to the validity of such composition; but experience having shewn that these precautions were insufficient, and the possessions of the church being by means of such agreements frequently impaired, the disabling statute of the 13th of Eliz. c. 10. referred to in the commencement of this work, was passed, which prohibits, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives, or twenty-one years. So that now by virtue of this statute no real composition made since the 13th of Eliz. is good [221] for any longer term than three lives, or twenty-one years, though made by consent of the patron, and ordinary. Thus the mischief has been effectually obviated, such compositions being now rarely heard of, unless by authority of parliament (*c*).

The distinction between a modus and composition real is clearly settled. A modus must be taken to have immemorially existed, and it requires no other evidence to prove it than immemorial usage: a composition real must have commenced within time of memory, and its commencement must be proved; for otherwise every bad modus would be set up as a real composition; but to establish such composition real, it is not requisite that the deed by which it was created, should be shewn; for that purpose, it is sufficient to adduce evidence, from which it

(*c*) 2 Bl. Com. 28. 2 Wooddes. 106. Gwill. 591. Ekins *v.* Dormer, Gwill. 800. 3 Atk. 534. See also Attorney General *v.* Bowles, 3 Atk. 809. & Gwill. 109. Deg. p. 11. c. 20. 2 Bos. and Pull. 206.

may be inferred, that such deed did once exist, and by which the court is warranted in presuming, that such composition took place, upon a solid and legal foundation: thus the consent of the ordinary to the composition real, shall be presumed from length of time, and where it appeared that king Edward the third entered into a composition real, as owner of the land, and as patron of the church, it was held, that he might also be presumed to have acted on that occasion, as supreme ordinary. After an acquiescence in such agreement by successive incumbents during a long period of time, it appears by a series of authorities, that the courts are averse from disturbing the quiet of a parish, and lean to the presumption, [222] that in the transaction *omnia solemniter fuisse acta* (*d*).

An agreement by the parson, patron, and ordinary, confirmed and established by a decree in equity, since the statute of the 13th of Eliz., though some centuries ago deemed binding (*e*), it is now settled, can bind only the parties to the same, because property can be affected only by the law of the land. Thus to an information brought by the Attorney General, at the relation of Dr. Blair the rector, for an account and payment of tithes in kind, the defence set up was, first, an agreement entered into in the year 1664, between a former rector, and the owner of the lands in the parish, for accepting a yearly sum of eighty pounds in lieu of tithe; and farther, a decree was insisted on, which appeared to have been pronounced in 1677.

(*d*) Heathcote *v.* Mainwaring, Gwill. 1345. 3 Bro. Ch. Rep. 217. Sawbridge *v.* Benton, Gwill. 1397. 2 Anstr. 372. Benson *v.* Watkins, Gwill. 612. Bunb. 10. Franklin *v.* Holmes, Gwill. 1220. See also Gwill. 689. and Robinson *v.* Appleton, 1101. Ibid. and Startup *v.* Dodderidge, Gwill. 587. See Haywood *v.* Nicholls, Gwill. 1120.

(*e*) See O'Connor *v.* Cook, 8 Ves. jun. 537.

between the same parties, with the exception of the bishop, who was no party to the agreement. It was also urged, that a court of equity could not relieve; and lastly, the length of time was objected to, as a bar to the plaintiff's demand. But lord Northington C. was of opinion, that the agreement was on the face of it unequal in respect of the consideration stipulated to be paid to the rector; for it appeared, that the agreement was entered into in order to effectuate an inclosure of the open fields in the parish; and that no consideration was allowed in respect of the future improvement of the lands by such inclosure, of which the occupiers would reap the benefit, and which was always allowed in every private bill for an inclosure. [223] That even if the agreement were equal, it would not bind the successor in the rectory, but would be void as against him. That as to the decree, it appeared to have been made in a cause by consent between the same parties, except the bishop of the diocese, a mere formal party. That the parties themselves did not consider the agreement as binding on the rector; for they regarded the annuity of eighty pounds as not being an adequate consideration for the rector's having relinquished his tithes in kind; and, therefore, they entered into a new agreement, by which they contracted to allow him the additional sum of sixteen pounds eight shillings and seven-pence per annum; and on being allowed that addition, the rector by his answer consented to have the agreement established; and although the decree founded on the agreement in terms bound the successors in the rectory, yet it was in a cause by consent, and could have no such operation; and as to the cases cited to a different effect, his lordship disallowed their authority. That the agreement and decree being laid out of the case, a court of equity might give relief: *Equitas sequitur legem.* That it is a fixed rule at law, that no prescription can run against the church, and

that length of time ought in this case to be no bar. And the court, after observing that if the parties had made an allowance for the future improved value of the tithes, the rector might have been left to his legal remedy, decreed an account of the value of the tithes which had accrued from the time of filing the information, and that the balance of such accounts should be paid to the relator; and the decree was affirmed on appeal by the house of Lords (*f*).

There are also other species of composition than [224] compositions real. Thus a composition to have a cow, and a certain number of other beasts fed in a wood, in lieu of tithes of pannage, is good (*g*). So in an action of trover for a lamb, and a sheaf of wheat, a special verdict was found, that between the years 1216 and 1261, there was a composition between the abbot and convent of the abbey of *Fountains* of the Cistercian order, and the prebendary of Studley, that the abbot and convent should be for ever free from the payment of tithes of their lands which they tilled with their own hands, within a certain grange, within the prebend, and that they should pay tithes for all lands without the grange, and that the abbot and convent should pay annually to the prebendary and his successors five marks. It was further found, that in the year 1359, there was another composition, reciting the former; but it was not found that this was confirmed by the patron and ordinary, by which the prebendary and his successors were to have their election yearly, either to receive tithes in kind of corn and grain arising within the places aforesaid, as

(*f*) Attorney General & Blair v. Cholmley, Gwill. 914. Ambl. 510. 4 Bro. P. C. 332. And Cartwright v. Cotton, in the Exchequer, 24th of April, 1779. S. P. 2 Woodd. Lect. 107. Jones v. Snow, Gwill. 1199. Cuthbert v. Westwood, Gwill. 666. Gilb. Eq. Rep. 230.

(*g*) Gwill. 116. Query if this be not a composition real?

well of lands in the hands of the abbot and convent as in the hands and manurance of their tenants, or to receive five marks, so as such election were notified to the abbot; and for those years, in which the prebendary should choose to receive tithes, the five marks were not to be paid. It was then found, that the possessions of the abbey came to the crown by statute 31st Hen. VIII. and that at the time when the action was commenced, the defendants were proprietors of the lands, and that the plaintiff was seised in fee of the prebend, and that a lamb and sheaf were then renovant upon the lands. The court of exchequer held that the second composition did not affect the successors of [225] the prebendary, and that, therefore, the abbot was not bound by it; that the power of election was gone, and consequently the first composition should stand *quoad terras in propriis manibus*; and that for the others, tithes in kind might be taken as before (*h*).

Farther, in a case, in which the lessee of tithes agreed with the owner of lands for certain collateral considerations not to take tithes in kind from the tenants for twelve years, but to accept a reasonable composition not exceeding three shillings and sixpence per acre, and thereto bound himself and his assigns, this agreement was held void, from the uncertainty of the sum to be paid; and the under lessee, who sued the tenant of the land for tithes in kind, obtained a decree in his favour (*i*).

Nor is it necessary that the composition should be in writing; but a parol agreement for that purpose shall be allowed to operate. Thus to a bill by the lessee of the rector for tithes in kind, the defendants pleaded a verbal

(*h*) Ingleby *v.* Wyvell, Gwill. 416.

(*i*) Brewer *v.* Hill, Gwill. 1418. Anstr. 413.

agreement between them and the rector, that they should retain their tithes for three years, paying a certain sum of money; and a question was raised, whether the above agreement was binding upon the rector and the plaintiff, and the court declared the agreement to be valid (*j*). So a parol agreement for a composition, made between the occupier, and the agent of a proprietor of tithes, will bind the proprietor (*k*). But it is clear that where there is a composition between the parson, and the occupiers, and the money paid and accepted during the incumbent's life; yet, upon his death, the successor may sue for the tithes in kind, without notice that he refuses the composition, because it determined by the death of the incumbent [226] who made it, and the successor may continue, or wave it at his election (*l*); and even an agreement by deed between the vicar, and the patron, with the consent of the ordinary, and the inhabitants of a vill within the parish, to pay six pounds in lieu of all tithes arising within the vill acquiesced in for a hundred years was held not to be binding on the successor of the vicar (*m*). Such also was the decision in regard to an agreement for the acceptance of land in lieu of tithes, entered into subsequently to the statute 13th Eliz. though sanctioned by the concurrence of all parties interested, and confirmed by a decree in equity (*n*). But if upon coming to the living the successor accept the composition, that will amount to a confirmation so far as to oblige him to give notice of his renouncing it, and demanding tithes in kind, before he brings his bill; for without such notice the occupier making a tender of the money before the commencement

(*j*) Keddington *v.* Adamson, Gwill. 611. Sed vid. S. C. in not. Ibid. and supra, 32.

(*k*) Chave *v.* Calmel, 3 Burr. 1873. Gwill. 926.

(*l*) Brown *v.* Barlow, Gwill. 1001.

(*m*) Lloyd *v.* Mortimer, Gwill. 1090.

(*n*) Jones *v.* Snow, Gwill. 1199.

of the suit, and offering by his answer to pay it, shall not be liable to costs; but in most cases will be entitled to his costs from the parson, if he relies on the tender for his defence (*o*).

If the vicar shew a composition, that the parson used only to have the tithe of corn, the vicar shall have the tithes of rape seed, hops, and other tithes, comparatively of modern introduction into this country (*p*).

In case a bill be filed for a composition for so much in the pound according to the rent of the land, the account [227] is consequential to the discovery, as well as in the case of suing for tithes in kind; though it was objected on the part of the defendant, that the discovery once obtained, it was a question solely at law, and the subject of an action of assumpsit (*q*).

With respect to notice of the determination of a composition, such notice must be given by analogy to the notice given in holding of land, and is regulated in the same manner as between landlord and tenant, from year to year; for the composition with the occupier is similar to a lease to a stranger: therefore, if a composition for tithes be made by A. as proprietor, and he grants a lease of them to B. whose interest is afterwards determined before any alteration is made in the composition, A. cannot determine it without giving six months' notice (*r*). And upon this principle in the Kensington case above referred to (*supra*,

(*o*) Brown *v.* Barlow, Gwill. 1001.

(*p*) Robinson *v.* Brooke, Gwill. 471.

(*q*) Worrall *v.* Nicholls, Gwill. 1302.

(*r*) Wyburn *v.* Tuck, Gwill. 1517. and 1 Bos. & Pul. 458. vid. Reynell *v.* Rogers, Gwill. 612. Hilton *v.* Heath, Gwill. 845. See also Price *v.* Elvey, Gwill. 911.

123, 124), it was expressly decided by the house of Lords, in concurrence with the unanimous opinion of the judges, that a notice given upon the eighth of September to determine a composition from year to year, such year commencing on the twenty-ninth of September, is by no means sufficient to determine such a contract (*s*): Nor if a notice be too late to determine a composition from year to year, will it be sufficient to determine the composition for the succeeding year (*t*). But where a composition is payable at Christmas; notice at any time before Christmas, given expressly for the succeeding year, will be sufficient (*u*).

It seems competent to a defendant to object to [228] the want of a sufficient notice to determine the composition, though he insist upon it also as a modus (*v*).

(*s*) Adams *v.* Waller, Gwill. 1204.

(*t*) Bishop *v.* Chichester, Gwill. 1321.

(*u*) Glass *v.* Caldwall, Gwill. 1030. Vid. Walter *v.* Flint, Gwill. 985.

(*v*) Bishop *v.* Chichester, Gwill. 1322. Sed vid. Atkyns *v.* Lord Willoughby de Brooke, Gwill. 1412.

CHAPTER IX.

Of Tithes in London.

ANTECEDENTLY to the reformation and the dissolution of monasteries, the maintenance of the secular clergy of the city of London, a subject involved in considerable obscurity, seems to have arisen principally from voluntary oblations, and from personal tithes, which were nearly of the same nature: But certainty in respect to the quantity, value, or specific articles to be offered, not being prescribed by any canon or law, frequent litigations arose between the clergy and the citizens, and inhabitants, relative to such payments; the progress of which is minutely traced by Dr. Burn; but it is altogether unnecessary and uninteresting to enter into any detail of these disputes; it is sufficient to observe, that at the period of the reformation the provision for the parochial clergy of London, on whom the functions before exercised by the regular priests had devolved, had become very precarious, and inadequate (*a*).

In order therefore to remedy this deficiency, and to adjust a matter of so great concern, it was submitted to the archbishop of Canterbury, and the lord Chancellor, and other lords of the council; and they made an order for the payment of tithes within the city, according to

(*a*) Bennett *v.* Trepass, Gwill. 640. 2 Bro. P. C. 437. See also Dunn *v.* Burrell and Goffe, Gwill. 299 13 Ves. jun. 16, 17.

the rate of two shillings and nine-pence in the pound. This order or decree was first promulgated by proclamation, and afterwards established by act of parliament, the 27th Henry the eighth, c. 21. But the same not being altogether complete, a subsequent order or decree was pronounced by the Lords for the like purpose with some [230] additions, and was confirmed by the statute 37 Henry the eighth, c. 12 (*b*), by which a proper provision for that learned body was finally ascertained, and regulated, which, after appointing arbitrators, sect. 1. was to the following effect: 2. That the inhabitants of houses, and occupiers of shops and other buildings in the city of London and its liberties, shall pay to the parsons, vicars, and curates after the rate of one shilling and four-pence halfpenny for every ten shillings annual rent; and for every twenty shillings annual rent, two shillings and nine-pence; and so for above the rent of twenty shillings by the year, ascending from ten shillings to ten shillings, according to the rate aforesaid: 3. That if any lease of such houses or other buildings shall be made by fraud, reserving less than the accustomed rent, or without any rent reserved upon the same by reason of any fine, or any other fraud, the occupiers shall pay according to the aforesaid rate, on the usual and fair rent before the making of such lease: 4. That owners occupying their own houses, shops, or other buildings, shall pay according to the same rate, on the last rent: 5. That lessees of a house or other building inhabiting part and letting out the residue, shall pay after the same rate according to the quantity of their rent by the year: 6. That where lessees of diverse houses and other buildings shall assign or let out some or one of such buildings, or, 7. where a lessee of one house or other building, shall let the whole of such house or building to one or

(*b*) Bennett *v.* Trepass, Gwill. 643, 644. Degge, p. 2. c. 25.

more person or persons, the occupiers shall pay according to their respective proportions of the rent: 8. That dwelling-houses converted into warehouses, or warehouses converted into dwelling-houses, shall be subject to the same rates: 9. That where any dyehouse or brewhouse, with implements for dyeing or brewing, shall be demised with a rent reserved, as well in respect of such implements as [231] of such dyehouse or brewhouse, it shall be subject to the same rate with the third penny abated: and that a principal house with a quay or wharf having any crane or gibbet shall pay after the like rate, with like abatement: and that wharfs belonging to houses without crane or gibbet, shall pay the same as mansion-houses: 10. That where any mansion-house, with a shop, stable, warehouse, and other appurtenances, shall have been occupied together, and shall be afterwards severed, each part shall be subject to the same rate according to the several rents reserved: 11. That the tithes shall be payable quarterly at the four most usual feasts of the year: 12. That every householder paying ten shillings rent or above, shall for himself be discharged of his four offering days; but his wife and family taking the rights of the church at Easter, shall pay two-pence for their four offering days yearly: 13. That where a house shall have been let for ten shillings yearly or more, and shall be subdivided into parcels yielding less than ten shillings yearly, the owner or principal lessee shall pay the whole rate, and the under lessees shall be discharged paying two-pence yearly for their four offering days: 14. That for such gardens as appertain not to any mansion-house, which any person holds for pleasure or his own use, he shall pay no tithes: but if he hold such garden, containing half an acre or more, and shall make any yearly profit thereof by way of sale, he shall pay tithe for the same, after such rate of his rent as first above specified: 15. That if any such garden, then being of the quantity

of half an acre or more, be thereafter by fraud divided into less quantities, payment shall be made according to the rate aforesaid: 16. That the houses of the nobility in their own hands, and the halls of companies unletten, which have not in times past been used to pay tithes, shall be exempt: 17. That the same exemption shall extend to sheds, stables, cellars, timber yards, and teinter yards, which were never parcel of any dwelling-house, [232] and have not been accustomed to pay tithes: 18. Provided, that where less than the above rate hath been accustomed to be paid for tithes, the accustomed rate shall be continued: 19. That disputes shall be decided by the mayor, by the advice of council, with costs at his discretion and that of his assistants: 20. That if such disputes shall not be so determined within two months, the lord Chancellor, on complaint to him made within three months then next following, shall decide the same with such costs as shall be thought convenient; provided that if any tenement, on account of great ruin or decay, shall be let for less than the usual rent, the occupier shall pay only after the rate of the rent reserved.

In consequence of the fire of London, and its extensive ravages, it became necessary for the legislature again to interpose in respect to tithes payable within the city; and accordingly the tithes of those parishes, the churches of which were by the fire of London either demolished, or in part consumed, whether remaining single or united, were by the statute 22d and 23d Car. 2. c. 15. reduced to a certainty (*c*); and the sums so ascertained, with glebes and perquisites, gifts and bequests to the respective parson, vicar, or curate of any parish, were declared to be the

(*c*) Vide Appendix.

annual maintenance of the respective parsons, vicars, and curates, as therein particularly mentioned.

The annual tithes of those parishes as settled by stat. 22 and 23 Carr. II. c. 15.; were augmented by stat. 44 Geo. III. c. lxxxix., entitled, "an act for the relief of certain incumbents of livings in the city of London," whereby after reciting that the said first mentioned act had failed in providing a proper maintenance for the parsons, vicars and curates in those parishes, inasmuch as the respective incomes being by the said act fixed at very low rates, the same are by the decreased value of money, the enhanced price of all the necessaries of life, and by various other circumstances peculiarly attached to the incumbents of the city of London, become greatly insufficient for the due support of their situation and character: It is enacted, that instead of the annual tithes of the parishes within the city of London and the liberties thereof, whose churches were demolished, or in part consumed by the fire, the annual certain tithes or sums of money in lieu of tithes of those parishes, shall be increased as therein stated (*d*): That the sums of money so to be paid in lieu of tithes shall be the annual maintenance of the said clergy, over and above glebes and perquisites, gifts and bequests to them respectively: That the aldermen, and common council, and church-wardens may make assessments on houses and other buildings, subject to an appeal to the lord mayor and court of aldermen, and the assessments may be altered every seven years: That four transcripts of such assessments shall be made, one of which shall be deposited in the town clerk's office of the said city, another in the registry of the consistory

(*d*) Vide Appendix.

court of the bishop of London, another in the vestry of the parish, and the remaining transcript shall be delivered to the incumbent: That the said sums shall be payable by quarterly payments on 25th December, 25th March, 24th June, and 29th of September, in every year: That the impropriators in those parishes shall continue to pay what they have been accustomed to pay.

On the above mentioned decree and statute of the [233] 37 Henry the eighth, c. 12. a variety of points have arisen and been discussed; as for example, with reference to the extent of the exemption of houses and buildings within the city; whether such exemption is to be restricted to the houses and buildings expressly excepted by the statute, or whether it shall be permitted in any other cases; with respect to the import and operation of the word "rent," as used in the decree; as whether it means actual rent, or estimated rent with reference to the value, a point involving in it the consideration of houses in the occupation of the owners themselves; at what rate the payment in lieu of tithes shall be made as authorised by custom; what shall be the consequence of erecting new houses on the scite of old houses, or of erecting a house on the scite of a building, as for example, a shed, which was not [234] liable to the payment of tithes.

Thus, where to a suit for tithes of a house in London, it was insisted that the house belonged to a priory which were discharged of tithes by a papal bull; the court held, that by the common law houses paid no tithes, and the right in that case arising immediately on the statute's being enacted, which imposes them generally upon every house, no exemption shall be allowed but to such houses as are specially exempted by the statute itself (*e*).

(*e*) Green v. Piper, Gwill. 164. Cro. Eliz. 276.

So in respect to the import of the term, "rent," where a question was raised, whether a rent for half a year of a house in London, and afterwards for another half year, was a yearly rent within the meaning of the statute: It was resolved in the affirmative (*f*).

So where the tithes of a house in London were claimed, the ancient farm rent of which was five pounds at the time of and subsequently to the decree and statute, and a new lease had been recently made of the house, reserving the rent of five pounds a year, in addition to which a great income or fine was covenanted to be paid yearly, at the time of payment of the rent, as a sum in gross; it was contended, that such reservation and covenant were evidently fraudulent, and with a design of depriving the parson of the tithes of the true rent of the house, which belonged to him by virtue of the decree and statute, for that the whole might have been reserved in the shape of rent; but it was resolved by the court, that if so much rent be reserved as was accustomed to be paid at the time of the statute, whatever fine or income may be paid, the [235] parson according to the true construction of the decree, can complain of no fraud; for the fraud thereby prohibited, is, where less rent than was then accustomed to be paid is reserved, or if no rent at all be reserved; for then tithe shall be paid according to the rent which was then last before reserved: and it was farther resolved, that in respect to such houses as were never leased, but inhabited by the owner, this was a *casus omissus*, and that they were not within the decree and statute, and consequently not liable to any payment for tithes (*g*).

But in the same case it was clearly held, that if no fine

(*f*) Meadhouse v. Taylor, Noy. 130. See also Gwill. 329, in not. (*g*) Skidmore v. Bell, 2 Inst. 660.

or income be paid, yet if no rent be reserved, the parson shall have the tithes according to the decree; for that the case stated by the decree is stated merely as an example, or reason why no rent is reserved; and whether any fine, or income be paid, or not, is immaterial to the parson.

The second, however, of these points appears questionable, and unsupported by reason, and the spirit and intention of the decree. There seems no ground for exempting houses, because they were never in lease, and always in the occupation of the owners. And in a recent case, which I shall presently mention, it was denied by the court (*h*). In regard to the first point, it was much discussed, in a case in which A. being seised in fee of a house in London, which from time immemorial had been let for five pounds per annum, made a lease of it, reserving the rent of five pounds per annum, with a covenant also for the payment of one hundred and seventy-five pounds in the name of a fine and income to be paid in several sums of twenty-five pounds per annum during the term; that is, twelve pounds ten shillings on one of the days on which the rent was made payable, and twelve pounds ten shillings on the other of such [236] days: And it was considered as very dubious, whether tithes were payable under the decree and statute, according to the ancient rent only, or according to the ancient rent and the sum reserved for the fine and income; or, in other words, whether the parson was entitled to his tithes after the rate of five pounds per annum, or after the rate of thirty pounds per annum (*i*). However, it was held by Lord Loughborough C. in the minor canon's case, that the defendant having set forth his lease at a low rent, and a fine, and alleged, by his answer, that he had

(*h*) Infra, 245. (*i*) Dunn *v.* Barrell, Gwill. 299.

never heard of any greater rent being paid, and there being no evidence to the contrary, he was liable only according to that rent (*j*).

But it has been expressly decided, that the rate ordered by the decree and statute to be paid out of the rent of houses in London is assessible on the improved rent of such houses (*k*).

Yet, generally speaking, a defendant in such case may set up a customary payment to protect himself against the claim of the statutory tithe. Thus in a case in which the vicar of the parish of Saint Giles without Cripplegate, exhibited his bill in the court of exchequer against the defendants, as occupiers of houses within the parish, for tithes after the rate of two shillings and ninepence in the pound, according to the yearly rent of their respective houses, and grounded his demand upon the decree and statute; the defendants in their answer admitted, that [237] during the time mentioned in the bill, they had respectively occupied houses within the parish at different rents, which they specified, but insisted that no such demand was ever made as two shillings and ninepence in the pound, by any former vicar of the parish, nor was the same ever heard of within the parish, till the plaintiff became vicar, which was but two years before the commencement of the suit: And they farther insisted that they were exempt from such payment, after the rate of two shillings and ninepence in the pound, either by virtue of the statute and decree, or by some other lawful means.

(*j*) Warden, &c. of St. Paul's v. Crickett, 2 Ves. jun. 563.

(*k*) Sheffield v. Pierce, Gwill. 503. Ivatt v. Warren, Ibid. 1054. Sayer v. Mumford, Ibid. 546. Kynaston v. Willoughby, Gwill. 891. in not.

There was no proof in the cause, whether the houses in question were in lease at the time of passing the act or not; nor was there any evidence, that the sum of two shillings and ninepence in the pound was at any time paid, according to the value of the houses, by virtue of the statute and decree; but it was proved, on the part of the defendants, that till the time of the then present vicar, the witnesses had never heard of any such demand as two shillings and ninepence in the pound for tithes within the parish; it also appeared by ancient tithe-books of the parson, that less sums which were therein specified, and proved to be in the hand-writing of the collector, had been collected, though, indeed, such payments did not appear uniform. It was also proved, that for nine years, in the time of the former vicar of the parish, the witness lived in the house of one of the defendants, and during those nine years he never paid any more to the vicar than ten shillings a year, or two shillings and sixpence a quarter; therefore, the question in the cause was, whether two shillings and ninepence in the pound of the yearly rent of the respective houses was due for tithes by virtue of the statute, or not.

It was resolved in the negative by three of the barons, the fourth dissentient. They observed that it was evident on the construction of the statute itself, and on the authority of Lindwood, that in many places in [238] the city there had been a custom to pay tithes according to the pound rate, which the statute never intended to alter or enlarge, but to establish; for the statute was not designed in destruction of any settled right. They were also of opinion, that if there had been a payment of less sums, by agreement between the parson, and the parishioners, they were confirmed by the statute, because it was the design of the statute to settle such customary payments,

and to prevent their being unravelled on either side. That accordingly such customary payments and agreements had been complied with ever since the statute, and less sums had been paid by almost every parishioner to the parson, with which he had been content; that although several decrees had been made in the court of exchequer for payment of two shillings and ninepence in the pound, yet no customary payments in any parish had been compounded between the parties, and the manner of tithing had continued the same in each parish, except in such parishes as were otherwise regulated by the statute 22 Car. II. c. 15.

They observed, that sect. 18. was a perfect exception out of the decree, of all those who had paid less sums; and that therefore, this could not be urged as a modus, or set up in bar of tithes, for tithes were originally due, and consequently the bar must be complete; but there are no tithes of houses but of common right, for they are not of that species of substances which *renovant in annum*; and, therefore, the common law, which follows the Levitical code, did not make them tithable; and they are tithable only by special custom, or agreement. Vid. *supra*, 150. 229.

They farther remarked, that the new rate of two shillings and ninepence in the pound was superinduced by [239] the decree, and that it was a strange proposition, that the decree was in prejudice of the clergy, when it appeared that less sums were constantly paid for houses in the city, than what would be paid if they were rated under the decree; and moreover it appeared, that the ancient payment in lieu of tithes of houses in London was somewhat less than two shillings and ninepence in the pound.

They farther held that this decree was made that all persons should pay the received rents from houses; that where there had been accustomed payments, the tithes were to continue payable according to that custom; and where there was no immemorial custom, yet if there had been by agreement a payment for eight years past, this according to the true construction of the statute was to be regarded as a customary payment; for that the divisions and severances of the houses, wharfs, and warehouses were to be as they had been for eight years past; that therefore it appeared to the court, that if there had been an agreement to pay tithes for eight years past, they were accustomed payments within the statute, consonant to an uniform notion, that if there were tithes by custom, or by agreement for eight years past, (*l*) they are within sect. 18. of that statute.

That if all that pay less sums be exempted from payment under the decree, and be not within the decree, nor within the obligation of the statute, the court ought to try whether there be such accustomed payments, or not, especially since it appeared by the books of the parson that less sums were collected; and it could not be presumed, that they would have been collected in that manner, if they had not been old accustomed payments; for how [240] could those sums have come into the parson's books, if they had not been the old accustomed dues?

That the difference of the payments in the books might be reconciled by supposing some of them to be quarterly, some half-yearly payments; that the question related to the inheritance, and the inheritance was to be bound by the court's decree; and where the inheritance is charged

(*l*) Sed vid. Brampston v. Heron, Gwill. 1315. contra.

merely by custom, it is just and usual, if the parties desire it, to try such custom at law.

The court, therefore, conceiving some doubt in relation to these payments, ordered that it should be referred to a trial at law upon the issue, whether any, and what sum or sums less than two shillings and ninepence in the twenty shillings' rent had been accustomably paid by the defendants for tithes, for the houses in possession of the defendants, or any and which of them, although no proof that there had been any regular modus. From this decretal order the plaintiff appealed to the house of Lords, insisting that no issue ought to have been directed; but such decretal order *dissentiente clero* was affirmed (*m*).

Again, in a bill filed by the warden and the minor canons of St. Paul's and their lessees claiming tithes at the rate of two shillings and nine-pence in the pound under the decree and act of parliament, the defendants by their answer insisted upon various payments less than two shillings and nine-pence in the pound, by reference to a paper, which they called the first, or ancient rate, and that such payments under it were ancient customary payments. In their subsequent answer to the amended bill, they set up [241] a different rate, and insisted upon the same by their cross bill, and Lord Eldon C. upon the whole record, was of opinion that no specific customary payment was set up, as two different payments were set up; and his lordship held, that if a party insist that a less sum than two shillings and nine-pence in the pound has accustomably been paid, he must prove what was the specific sum. Whatever may be the difficulty of believing that so large a

(*m*) Bennet *v.* Trepass, Gwill. Eq. Rep. 191. 8 Vin. Abr. 568. 633. 2 Bro. P. C. 437. Gilb. pl. 3. Bunb. 106.

sum as two shillings and nine-pence could have been paid before the time of Henry the eighth, it does not dispense with the necessity of proving what was the actual amount of it; and inasmuch as the sum of two shillings and nine-pence is *primâ facie* due, if no other payment can be substantiated by evidence, that sum must be decreed to be paid (*n*). That in respect to the meaning of the expression "accustomed to be paid," it is clear it must not be construed to extend beyond the time of memory: That though in the case of Bennet and Trepass, it was considered that upon the statute eight years for this purpose were sufficient (*o*), yet it is not to be considered as settled in that case, that such is the period. It has been urged, that it is sufficient, if within the limits of the ecclesiastical law, which are much shorter than the time of memory (*p*).

Also, in a recent case, a bill was filed under the decree and statute seeking payment at the rate of two shillings and nine-pence in the pound upon the annual value to be let, of premises consisting of extensive warehouses lately erected by the East India company, and used by them in the course of their trade. These warehouses were erected upon the scite of small tenements, some of which appeared by the answer to have been formerly oc- [242] cupied at low rents, and as to the others, the ancient rents were not known. The answer did not state any specific customary payment in lieu of tithes, but alleged generally, that some less sums than after the rate of two shillings and nine-pence in the pound were paid, specifying by a sche-

(*n*). The warden, &c. of St. Paul's, London, v. Morris, 2 Ves. jun. 155.

(*o*) Gwill. 1315. Contrà.

(*p*) 2 Ves. jun. 155. Vid. infra, 251.

dule some payments; not however carrying them back to the date of the statute.

The defendants insisted, that the payment according to the statute, could be only upon such of the old rents as were ascertained, and that nothing was to be paid in respect of those premises, the ancient rents of which were not known; and they contended that an issue ought to be directed.

On the part of the plaintiff it was insisted, that here was no allegation of any certain accustomed payment protecting the occupier from this payment at the date of the decree, and statute; that they allege merely, that at particular times there were particular payments with a general allegation, that some less sums than after the rate of two shillings and nine-pence in the pound were paid, not referring to the particular sums before stated, as those less sums. The question, therefore, whether an accustomed payment exists, is not raised upon the record: it was further insisted that there being no rents subsisting, the payment ought to be calculated, not upon the whole rent, but upon the present actual value of the premises to be let; that the houses being taken down, and much more valuable premises erected on their scite, it could not be alleged, that the premises were the same, or that the former rent could be the fair criterion.

[243] On the part of the defendants it was urged, that the customary payment was sufficiently stated to enable the defendants to go into evidence; that the result of the authorities is, that if a defence appears by the answer, the court will not make a decree against it; but will put it in

a course of investigation; that the distinction between rent and value is perfectly understood, both in common parlance, and legal acceptation, and that it would be doing great violence to the construction of the term rent, to give it the sense of the word value.

But Sir William Grant, M. R. was of opinion, that no sufficient ground had been shewn by the defendants for directing an issue, and decreed that the payment should be at the rate of two shillings and nine-pence in the pound on the value, and directed a reference to the master accordingly; his honour observing, that he was not aware of any case in which an issue had been granted, where the defendant did not specifically state what was the customary payment upon which he meant to insist; that this was not done by the answer either directly, or by reference; that in the case of the warden and minor canons of St. Paul's *v.* Morris just cited, the lord Chancellor was of opinion, that no specific customary payment was set up, because two different payments were set up; that here the objection is as strong where no specific payment is alleged: in that case, the different payments destroyed the specification; in this case there is no specification at all: that no exemption being claimed, and no customary payments sufficiently alleged, the rector was of course entitled to a decree, after the rate of two shillings and nine-pence. That the question then arose on how many pounds was the tithe to be taken? That the premises not being in lease no rent was reserved; all the property was in the occupation of the owners. Upon what was the payment to be? To which it might be fairly replied, that according to adjudged cases, rent means either actual rent, or estimated rent [244] with reference to the value, according to the clause of the statute, to which it is applicable. That in the case of

Grant *v.* Cannon (*q*), payment for tithe of a house, in the occupation of the owner, was directed to be according to the value admitted in that instance to be sixty pounds per annum, without any enquiry being directed at what rent the house had been last let, or what tithe was last payable. That in a variety of cases of this class the decree expresses, that the defendant shall account and pay after the rate of two shillings and nine-pence in the pound for the yearly rent or value of their premises. Not that the meaning is, that where there is a yearly rent, recourse shall be had to the value; but that the defendant is to account according to the rent, if there be rent, and according to the value, if there be no rent. That this construction is founded upon a sound principle; that in cases, to which none of the provisions of the statute apply, the rector's claim rests upon the first general clause making all houses generally liable to tithes; that if the general object were to subject all houses, particular words are to be construed so as to effectuate such general purpose, with reference to which, there is no reason for distinction between such houses as are let and such houses as are not let; on the contrary, the express exemption of some houses in the statute that never have been let, forcibly implies, that if that exemption were not expressed, all houses, whether let, or not, would be liable; that it does not follow where no rent is due, in the strict sense of the expression, that therefore no tithe is due; because, on the whole, less violence is done to the statute by construing the word rent in different senses, as it is used in different clauses of [245] the statute, than by holding all such houses as were never in lease to be without the statute; that to principle and authorities there was nothing to be opposed, but a

(*q*) Gwill. 341.

dictum of Lord Coke; for it was not in point in the cause, that where houses have never been let, that is a *casus omissus* and no tithe is payable; a proposition which can by no means be maintained (*r*).

In a case arising upon new buildings erected upon the scite of old houses, the defendant set up a customary payment to protect himself from the claim of the full statutory tithe; he established that defence as to three of the old houses; and the court seemed to have held, that a customary payment protected any houses on the same scite, as the premises were altogether out of the statute, if any customary payment at the time of the statute were established. The defendant failed in establishing any customary payment as to the fourth house, and the court, instead of directing an inquiry at what rent the fourth house was last let, immediately decreed, that the defendant should account and pay at the rate of two shillings and nine-pence in the pound for the premises, where the old house formerly stood, according to the yearly value; and took it to be so clear, that the decree was pronounced against the defendant with costs (*s*).

On the same principle, in another case it was decided to be no defence to a demand for tithe of a house in London, that it stood on the scite of old houses, which never paid any tithes. That if it had been shewn, that a less rate had been paid for them, it would have been a defence to that extent; but an entire exemption shall not [246] prevail. That all houses in general were intended by the

(*r*) Antrobus *v.* the East India Company, 13 Ves. jun. 9. See also Kinaston *v.* the East India Company, cited *ibid.* 12.

(*s*) Williamson *v.* Gosling, Gwill. 903.

decree is evident from the clause which directs, that dwelling-houses converted into warehouses, and warehouses converted into dwelling-houses shall still pay as mansion-houses; and also from the exemption in favour of noblemen's houses, and the halls of companies. That as to the clause exempting detached sheds, and other buildings of a similar nature, this is not an exemption in favour of the land; for buildings, and not the land, are the subject of the act, and this privilege does not extend to the building when altered to another description (*t*). So it has been expressly decided, that a shed, or other building exempted by the decree, shall be discharged of tithes no longer than the same is continued a shed, or such other building; for that if it be converted into a dwelling-house, it shall pay tithes according to the true value (*u*).

A custom, that the parishioners of St. Leonard, Foster-lane, within the precinct of St. Martin-le-grand, shall pay to the parson two shillings in the pound of the rent of their houses by way of tithes, is valid; for it may have had a lawful beginning; it may have been a modus for all the tithes of the land, upon which the houses are built; and though it be afterwards built on, that shall not divest the parson of his right (*v*).

The statute 37 Henry the eighth, c. 12. for regulating the payment of tithes in London, extends both to lay im-[247] propriators, and spiritual persons; but the statute 22 and 23 Car. II. for the maintenance of parsons, vicars, and curates in those parishes, which were de-

(*t*) Branston *v.* Heron, Gwill. 1054.
1314.
(*u*) Ivatt *v.* Warren, Gwill. 259.
(*v*) Dr. Grant's case, Gwill. 11 Co. 16.

stroyed by the fire of London, extends to preaching ministers only (*w*).

The remedies for the recovery of the tithes in London will more properly come under discussion in the next and last chapter, which will treat of the remedies for tithes in general (*x*).

(*w*) Ward *v.* Hilder, Gwill. 538. Kynaston *v.* Willoughby, Gwill. 891. in not. Kynaston *v.* Miller, Gwill. 903.

(*x*) As to the extent of the city of London and its liberties, see Grant *v.* Cannon, Gwill. 541. and Grant *v.* Brown, Gwill. 544. Umfreville *v.* Batchelor, Gwill. 548.

CHAPTER X.

Remedies for the Recovery of Tithes or their Value.

REMEDIES for tithes, or their value, are in this country administered by various judicatures ecclesiastical and temporal, legal and equitable: They may also in certain cases be enforced by summary process. I shall therefore consider first the jurisdiction of the spiritual courts relative to this subject; next the jurisdiction of the temporal courts, comprehending the courts of common law, and courts of equity. I shall then treat of the nature of evidence in regard to tithes; and of the costs of suits relative to this species of property. I shall then point out the mode of enforcing the payment of tithes by summary process. And, lastly, I shall shew in what manner tithes are recovered in the city of London.

I. The law has been long settled, that the ecclesiastical courts have authority in some cases to determine the right to tithes, and in all cases to entertain suits respecting the subtraction, or withholding of tithes; and such their authority is confirmed by several acts of parliament (*a*): But the power of the spiritual tribunal to decide upon the right to tithes, exists only in those instances, in which the right comes in question between spiritual persons, or their

(*a*) 13 Ed. I. st. 4. or rather 2 and 3 Ed. VI. c. 13. Hen. VIII. c. 7. 9 Ed. II. 27 Hen. VIII. c. 20. 32

respective bailiffs, or servants (*b*). Between spiritual men and laymen, these courts have a jurisdiction only to compel the payment of tithes, when the right is not in con- [249] troversy, but merely the fact whether or not the tithes allowed to be due have been subtracted, or withdrawn (*c*). This is a transient personal injury, which may be redressed in the spiritual court by the recovery of the tithes, or their equivalent.

Agreeable to this distinction, if a dispute arise between two parsons to which of them the tithes belong; whether to the one by parochial right, or to the other as a portion belonging to the rectory by prescription, and they both claim by presentation under the same title, so that the right of patronage be not in controversy, the right to such tithes may be determined in the ecclesiastical court (*d*).

Such also is the law, where the question arises between the parson who is patron, and the vicar, whether certain specific tithes belong to the parson or vicar. The spiritual court may decide between them (*e*).

If the right to tithes is controverted between two clergymen, who have been presented to the same church by several patrons, in that case the spiritual court hath no jurisdiction to determine the right to the tithes, if they amount to the fourth part of the annual value of the church; but the title shall be determined in the temporal court; yet if the tithe in question do not amount to the

(*b*) Gwill. 1566. Year book, 11 a pl. 7.

(*c*) Degge, p. 2. c. 26. 3 Bl. Com. 88. See Gwill. 7 and 106.

(*d*) Degge, p. 2. c. 26. See Hickes *v.* Froud, Gwill. 269.

(*e*) Degge, p. 2. c. 26. Noy, 147. Moor, 907. Vid. Drake *v.* Taylor, 1 Stra. 87. Anon, Gwill. 280.

fourth part of the yearly value of the church, the ecclesiastical court hath in that case authority to decide the right. And if these spiritual persons claim both under one patron, there, although the whole tithes are the [250] subject of controversy, the spiritual court may determine the title to them (*f*).

But if, in a litigation between two spiritual persons relative to the right of tithes, a question is involved in regard to the boundaries of the parishes, it exclusively belongs to the jurisdiction of the temporal courts to determine it (*g*).

But the rule is not universal, that where the parties are both ecclesiastics, the courts of law will not grant a prohibition; for, though both parties be of that description, yet, if either of them insist upon a deed, or other matter properly triable at common law, a prohibition will certainly lie (*h*).

Thus, in special cases, the spiritual court may decide upon the right to the tithes; but its jurisdiction to hold plea for the subtraction and withholding of tithes is general, and is of remote antiquity, and, as I have just observed, confirmed by various statutes; in particular, by the statute, or rather writ, of *circumspecte agatis* (*i*) it is declared, that the court Christian shall not be prohibited from holding plea *si rector petat versus parochianos oblationes, et decimas debitas, et consuetas.*

But if any dispute arise, whether the tithes sued for be

(*f*) Degge, p. 2. c. 26.
(*g*) Ibid.
(*h*) Cheeseman *v.* Hoby, Gwill. 862. Willes's Rep. 680.
(*i*) 3 Ed. I. st. 4. or rather 9 Ed. II.

due and accustomed, it cannot be decided by the ecclesiastical court. It must be determined by the king's courts at common law. It is true, that a *modus decimandi* may as well be the subject matter of a suit in the ec- [251] clesiastical court, provided it be admitted between the parties, as the tithes themselves. Thus, where the defendant in a suit in the ecclesiastical court for the subtraction of tithes, filed a bill in equity to establish a modus, and on the mere suggestion of a modus, moved for an injunction to stay the proceedings in the ecclesiastical court, lord Hardwick C. refused the injunction recognising the right of the ecclesiastical court to retain suits for tithes, whether at the instance of a spiritual person, or lay impropriator, and that as well for a modus, if not denied, as for tithes in kind (*k*).

But if the modus be denied in the spiritual court, the necessary effect of such denial is a transfer of the jurisdiction; the ecclesiastical court cannot proceed *propter defectum triationis;* the modus must be tried at the common law (*l*). The principle upon which the spiritual courts are prohibited from the trying of moduses, is, that such question affects the temporal inheritance, and the decision must bind the real property; nor will the law suffer the existence of such a right to be decided by the sentence of any individual judge, or without the verdict of a jury; and, moreover, the ecclesiastical and temporal laws differ in respect to the time of limitation; according to the first forty years constitute a valid custom; whereas by the

(*k*) Rotherham *v.* Fanshaw, Gwill. 809. 3 Atk. 628. Scott *v.* Wall, Gwill. 431. Hob. 247.

(*l*) Gibs. Cod. 691. Hob. 247. Noy, 81. Hetl. 133. 1 Vent. 32. Blacket *v.* Finney, Gwill. 661. Bunb. 176. See Wright *v.* Wright, Gwill. 167. Napper *v.* Seward, Hob. 248. Gwill. 432. Salmon *v.* Rake, Bunb. 176. Gwill. 736. Taylor *v.* Wymond, Gwill. 1576.

second it must have subsisted beyond the time of memory (*m*).

But although one of the parties to a suit respecting tithes in the spiritual court be a layman, if he do not insist [252] on a modus, or some other matter properly triable at the common law, such court shall determine the question, and a prohibition shall not be granted (*n*).

So the spiritual court may take cognizance of a refusal (*o*) to set out tithes; and after the tithes have been severed, yet by the statute they remain the subject of suit in the spiritual court (*p*); and though the tithes be in fact set out, if the parishioner refuse to let the parson come for them by the usual way, he may still sue for them in the spiritual court (*q*); for a disturbance in the road for the carriage of tithes, is a question of ecclesiastical cognizance (*r*); the spiritual court having the jurisdiction of the tithes, which are the principal, shall also have jurisdiction of the way, through which it is necessary to convey the tithes. In those instances, in which the original matter belongs to the jurisdiction of the spiritual court, the decision of other matters, which depend upon it, belongs to the same tribunal, though triable by the common law (*s*); and though, as we have just seen, if after the tithes have been set out, the owner, or occupier of the lands detain them, a suit may be maintained against him in the spiritual

(*m*) Gibs. Cod. 691.

(*n*) Cheeseman v. Hoby, Gwill. 362. Willis's Rep. 680. See Anon. Gwill. 435.

(*o*) Gale v. Ewer, Gwill. 1579. 1 Com. Rep. 22.

(*p*) Blackwell's case, Gwill. 220. Cro. Eliz. 843. vid. Leigh v. Wood, Gwill. 205, and ibid. in not.

(*q*) Gwill. 1572. *Anon.*

(*r*) Halsey v. Halsey, Gwill. 468.

(*s*) Roberts's Case, Gwill. 893. 12 Co. 65.

court; yet if a *stranger* take them after they have been set out, the parson's only remedy is by an action at law against him (*t*). So it has been held that where fraud is used to deprive the parson of his tithes, it is not cognizable in the spiritual court, but is to be remedied by an action on the case; as in the case above-mentioned, (*supra*, 77) in which there was a custom, that the parson [253] was to have every tenth land for the tithe of corn, beginning from such land as is next to the church; and the occupiers of the land being aware what land would be the parson's, with the view of defrauding him did not till, nor manure, nor sow his land as they did their own, by reason of which fraud the parson sued in the spiritual court for tithes in kind, that is, the tenth cock of all the corn, and a prohibition was awarded, on the ground, that the fraud was to be redressed by an action at law (*u*).

If a party sue in the spiritual court, for a matter which appears on the face of his libel not to be within that jurisdiction, but of which the common law has jurisdiction, he is liable to an action on the case by the party sued: But if the subject of the suit be of ecclesiastical cognizance, and by the defendant's plea, or by collateral matter, the suit is barred, no such action at law can be maintained. And on this distinction it was held, that an action on the case did not lie by a party sued for tithes of gross trees, for though the statute 32 Hen. VIII. c. 7. enacts, that none shall be compellable to pay tithes of gross trees, yet it is lawful for the parson to agitate the question in the spiritual court, whether they were trees of that description, or not (*v*); though if in fact they be such trees, a prohibition, as we shall presently see, will be granted.

(*t*) Leigh *v.* Wood, Gwill. 158. Moore, 913.

(*u*) Stobs *v.* Goodlock, Gwill. 205.

(*v*) Lady Waterhouse *v.* Bawde, Cro. Jac. 133. Gwill. 227.

Such is the nature of the ecclesiastical jurisdiction relative to this subject; and in case of a suit for subtraction of tithes in the spiritual court, such jurisdiction is effectually aided by the statutes 27 Hen. the eighth, c. 20. and 32 Hen. the eighth, c. 7. which enact, that upon complaint of any contempt or misbehaviour to the ecclesiastical judge by the defendant in any suit for tithes, any privy-counsellor, or any two justices of the peace, or, in case of disobedience to a definitive sentence, any two justices of the peace may commit the party to prison, without bail or mainprize, till he enters into a recognizance, with sufficient sureties, to give due obedience to the process, and sentence of the court.

Farther, by statute 2 and 3 Ed. sixth, c. 13. it is enacted, that if any person shall carry off his predial tithes before the tenth part is duly set forth, or an agreement is made with the proprietor, or shall willingly withdraw his tithes of the same, or shall stop or hinder the proprietor of the tithes, or his deputy, from viewing or carrying them away, such offender shall pay double the value of the tithes, with costs, to be recovered before the ecclesiastical judge, according to the king's ecclesiastical laws (*w*).

[254] II. The jurisdiction of the temporal courts, in respect to this subject, is next to be considered: And first that of the courts of common law.

This jurisdiction is exercised by the courts of common law in a variety of forms. The right to tithes is discussed, and decided by them in prohibition, and in those actions mentioned in the several statutes of 32 Hen. eighth, and 2 Edw. sixth, I have above alluded to.

(*w*) See Rex v. Owen, 4 Burr. 2095. Gwill. 939.

This species of prohibition is a writ issuing out of the temporal courts directed to the judge and parties in a suit in the spiritual court, commanding them to cease from the prosecution of it, on a suggestion, either that the cause originally, or some collateral matter arising in it, does not belong to that jurisdiction; such prohibitions may be obtained out of the courts at Westminster, the courts of great sessions in Wales, or the counties palatine (*x*). The party aggrieved in the spiritual court applies to the temporal court, suggesting the nature and cause of his complaint, in being drawn *ad aliud examen* by a jurisdiction, or manner of process disallowed by the laws of the kingdom; if the matter alleged appear to the court sufficient, the writ of prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute the plea; if the point be too difficult to be decided on motion, the party applying for the prohibition is directed, in order that the matter may be more solemnly determined, to declare in prohibition, that is, to prosecute an action by filing a declaration against the other, on a fiction, which is not traversable, that he has proceeded in the suit below, notwithstanding the prohibition; if upon demurrer and argument, the court should hold the matter suggested to be a sufficient ground of prohibition in point of law, then judgment, with nominal damages, shall be given for the party complaining, and the writ of prohibition shall [255] issue; on the other hand, if the temporal court shall be of opinion, that there is no competent ground to restrain the jurisdiction, then judgment shall be given against the party applying for the prohibition, and a writ of consultation shall be awarded; so called, because, upon deliberation, and consultation, the judges find the prohibition to be ill-founded, and therefore by this writ they return

(*x*) Dugg. p. 2. c. 26.

the cause to its original jurisdiction to be there determined (*y*).

But although there may be sufficient ground in point of law for granting the prohibition, yet, if the fact which gave rise to it, be falsified, the cause shall be remanded to the prior jurisdiction; and, in order to put such fact in a course of trial, the party prohibited must appear to the prohibition, and take a declaration, which must always pursue the suggestion, and so plead to issue upon it, denying the contempt, and the fact upon which the prohibition was granted; and if that issue be found for the defendant he shall then have a writ of consultation: Or if the suggestion be not proved within six months, pursuant to stat. 2 and 3 Ed. VI. c. 13. s. 14. (*z*) the consequence shall be the same. The writ of consultation is also granted by the court, without any action brought, when, after a prohibition issued, upon more mature consideration, the court are of opinion, that the matter suggested is not a sufficient ground to stop the proceedings below (*a*).

I have already intimated, that if the right of patronage, the boundaries of parishes, or the existence of a modus come in controversy in the spiritual court, those are sufficient grounds for a prohibition to issue; but there are many other instances, in which such writ shall be granted; as if it be alleged in the spiritual court, that the lands, of [256] which the tithes are claimed, are discharged of tithes by the statute of 31 Henry eighth, or any other statute, a prohibition lies, because it properly belongs to the judges of the common law to expound all statutes (*b*). So the

(*y*) 3 Bl. Com. 113.

(*z*) See Wood's case, Gwill. 372, and Congley *v.* Hall, 2 Roll. Rep. 125. Gwill. 372.

(*a*) 3 Bl. Com. 114.

(*b*) Degge, p. 2. c. 26.

question whether a church be impropriate, or not, is triable only at common law, the patronage being a lay inheritance, and the impropriation having become a lay fee; and if it arise in a suit in the spiritual court, a prohibition shall be granted (*c*). In like manner, if the suggestion be grounded on the statute of 2 Edward the sixth, relative to barren grounds, the writ shall issue (*d*): So, if the parties sue in the spiritual court for the tithes of articles not tithable by the common law, or for the tithes of great wood above twenty years' growth, that is a sufficient ground for prohibition (*e*): So, if the spiritual court, in the discussion of matters clearly within its cognizance, transgresses the bounds prescribed for it by the laws of England, as where it requires two witnesses to prove a release of tithes, or refuses to admit the release as a defence at all, in such cases also a prohibition will be awarded; for, as the fact of executing a release, or the effect of such release, is not properly a spiritual question, but only allowed to be decided in those courts, because incident or accessary to some original question clearly within their jurisdiction; it ought therefore, when the two laws differ, to be decided, not according to the spiritual, but the temporal court; else the same question might be determined different ways according to the court in which the suit is depending, an incongruity which no wise government ought to tolerate, and which is therefore a ground of prohibition (*f*). So, if the spiritual court will not suffer the tenant to plead to the right of incumbency, a prohibition will lie (*g*). On the same principle, a prohibition was granted, where, in a suit for tithes, the occupier pleaded a

(*c*) Owen v. Parishioners of All Saints, Gwill. 278.

(*d*) Degge, p. 2. c. 26.

(*e*) Ibid. and Gwill. 4.

(*f*) 3 Bl. Com. 112. Cro. Eliz. 666. Hob. 188.

(*g*) Green v. Penilden, Gwill. 1568.

parol agreement with the parson's agent for the purchase of them, and the spiritual court rejected the plea; the court of King's Bench holding, that it was not a matter of appeal, but of prohibition; the rejection of the plea being a gravamen irreparabile, and founded by the ecclesiastical court on a supposed difference between their law and ours, their law not recognizing an agreement made with the agent of a proprietor of tithes, so as to bind him; whereas by our law, and in common sense, and common justice, a composition by the occupier with the agent of the proprietor, does bind, and ought to bind his principal: That where the ecclesiastical court has jurisdiction, and proceeds in the suit according to their law, where it does not differ from ours, the rejection of a plea would be matter of appeal: But where the ecclesiastical law differs from the common law, and the ecclesiastical court would require greater proof from the defendant below, than the common law requires, or would esteem an agreement not to bind the impropriator, which at common law would bind him, there an appeal could be of no service to the defendant in the ecclesiastical court, because the superior ecclesiastical court would equally adhere to their own law, as the inferior ecclesiastical court had done, and would determine alike as being guided by the same principle of determination (*h*).

Nor shall a consultation be granted, notwithstanding the insufficiency of the replication, if it appear to the court [257] upon the whole matter, that no tithes are payable (*i*): Nor even if the prohibition be erroneous, shall the defendant have a consultation, if it appear that the suit in the

(*h*) Chave v. Calmel, 3 Burr. 1873. Gwill. 926.

(*i*) Cotes v. Warner, Gwill. 275.

ecclesiastical court was not well founded (*k*). Nor is it necessary in prohibition, that the proof should be precise; it is sufficient, if it appear, that the ecclesiastical court ought not to entertain the suit; therefore, if a prescription be laid that the parson holds a hundred acres of land in satisfaction of tithes, and the evidence be, that he holds sixty acres only in satisfaction of them, that is sufficient, because the substance is proved (*l*). If a modus be not proved as laid by the plaintiff in prohibition, there must be a verdict for the defendant; but if *any* modus be found, though different from that laid, that is a valid ground for refusing a consultation (*m*). So, after a consultation has been granted, but not upon examination of the matter, another prohibition, notwithstanding the stat. 50 Edw. III. c. 4. may be awarded (*n*). So, after a consultation, a prohibition may be granted, if there be any material additions inserted in the libel (*o*). Pending a suit in prohibition, on suggestion of a modus, there can be no suit in the spiritual court for tithes, which have subsequently accrued (*p*). Where a modus is pleaded in the spiritual court, a prohibition may be granted at any time before final sentence (*q*). So, a prohibition shall be granted to a court of appeal, where it appears that such court has no jurisdiction over the subject matter, even after it has remitted the suit to the court below, and has awarded costs against the appellant, and though the party applying for the prohibition appealed (*r*).

(*k*) Hutton *v.* Barnes, Yelv. 79. Gwill. 225. 394.

(*l*) Austen *v.* Piggot, Gwill. 217. Cro. Eliz. 736. Beal *v.* Webb, Gwill. 220. Cro. Eliz. 819.

(*m*) Brock *v.* Richardson, Gwill. 1303. 1 Term Rep. 427.

(*n*) Sibley *v.* Crawley, Gwill. 217. Cro. Eliz. 736.

(*o*) Earl of Clanrickard *v.* Lady Denton, Gwill. 363.

(*p*) Linge *v.* Gunter, Gwill. 373.

(*q*) Darby *v.* Cozens, 1 Term Rep. 552. Gwill. 1304.

(*r*) Ibid.

But where the modus suggested appears to be void, unreasonable, or insufficient, as where it gives no recompence to the parson for the tithes, the court will not grant a prohibition (*s*). Nor shall a prohibition go where a modus is pleaded in the spiritual court, unless it be shewn that the plea has been allowed, as well as received (*t*); nor shall a prohibition be granted on a suggestion that the plaintiff in prohibition has but one witness to prove a deed in the spiritual court, unless such witness hath been offered and refused (*u*).

[258] If either the ecclesiastical judge, or the party shall proceed after such prohibition, an attachment may be had against him, to punish him for the contempt, at the discretion of the court that awarded it; and an action will lie against him to repair the party injured in damages.

2. In respect to actions maintainable in the courts of common law for tithes, they owe their origin to the 32 Hen. eighth, c. 7.; by the 7th section of which it is enacted, that any person having an estate of inheritance, freehold, term, or interest in tithes, and being disseised, or otherwise kept, or put out of possession thereof, shall have such remedy in the temporal courts for recovering the same, as the case may require, in like manner as they may for lands, tenements, and other hereditaments. By force of this statute, therefore, an action of ejectment will lie for tithes (*v*).

(*s*) Fletcher *v.* Wilkinson, Gwill. 675. —— *v.* Barnes, Gwill. 285. Portinger *v.* Johnson, Gwill. 286. and supra, 198.

(*t*) Serjeant *v.* Tralawney, Gwill. 662.

(*u*) Roberts's case, 12 Co. 65. Gwill. 230.

(*v*) See Selw. L. of Ni. Pri. 1069, 1070. and see also Dean and Chapter of Bristol *v.* Clerke, Dyer, 83. and Gwill. 124, 125.

Another species of remedy in the temporal courts for the subtraction of predial tithes is provided by the statute 2 and 3 Edw. sixth, to which I have just referred; whereby the treble value of this species of tithes so subtracted, or withheld, may be sued for in the temporal courts; and, in truth, such treble value is not more than an equivalent to the double value to be sued for in the ecclesiastical court: for a party may sue for and recover in the ecclesiastical court the tithes themselves, or a recompense for them by the ancient law, to which the suit for the double value is superadded by the statute. But as no action lay in the temporal courts for the subtraction of the tithes themselves, therefore, the statute gave a treble forfeiture, if sued for there, in order to make the course of justice uniform by giving the same reparation in the one court, as in the other (*w*).

Upon this statute, it is to be observed, that an [259] opinion originally prevailed, that as the person to whom the treble value is thus given is not specified, such value of right belonged to the king: But in Easter term, 29 Elizabeth, it was adjudged, on an information in the court of exchequer, that the treble value did not belong to the crown, but to the party interested, who may maintain an action of debt for the recovery of the same; and, in conformity to this decision, an action of debt, at the suit of such party, has been ever since considered as the proper remedy (*x*).

Yet this remedy, by the express terms of the statute, is restricted to predial tithes, and shall not be extended to such as are mixt, or personal. Thus where in an action

(*w*) 3 Bl. Com. 89. See Beadle 206.
2. Sheppman, Cro. Eliz. 606. Gwill. (*x*) Selw. L. of Ni. Pr. 1073.

on this statute for not setting out the tithes of cheese, calves, and lambs, the plaintiff obtained a verdict; on motion in arrest of judgment, it was objected that the tithes in question were not predial tithes, and consequently not within this statute, which being penal, ought not to be extended by implication; and of this opinion was the whole court. So where the plaintiff declared for not setting out predial tithes, and *other tithes*, as the tithes of lamb-wool, &c., and the jury found a general verdict, judgment was arrested upon the same objection (*y*). But an action of debt may be maintained on this statute for not setting out small tithes, as well as great tithes, provided they are predial tithes (*z*); or for a portion of tithes, on a general allegation, that the plaintiff is seised of a portion of tithes of certain lands, without setting out his title (*a*).

This species of action may be brought by the rector, (*b*) or by one (*c*) or more (*d*) farmers of the rectory. If the rector be entitled to two parts, and the vicar to a third [260] part of the tithe, and the parson and vicar by several leases demise their respective shares to a third person, such lessee may maintain an action for not setting forth *all* the tithes (*e*).

The right to tithes accrues immediately on the severance; consequently, this action must be brought by the person intitled to the tithes at the time of the severance.

(*y*) Selw. L. of Ni. Pri. 1074.

(*z*) Ibid. 1075. See Wortley *v.* Herpingham. Cro. Eliz. 766. Gwill. 218. as to plea.

(*a*) Saunders *v.* Sandford, Gwill. 298.

(*b*) See Phillips *v.* Kettle, Hardr. 173. Gwill. 513.

(*c*) Kent *v.* Peakeyon, Cro. Jac. 70.

(*d*) Day *v.* Peckwell, Moor, 915. Gwill. 221.

(*e*) Champernon *v.* Hill. Cro. Jac. 66. Gwill. 225.

Thus, where A. executed a lease of tithes to B. on a day subsequent to the severance, but before the tithes were carried away by the occupiers of the land, it was adjudged that B. could not maintain an action on this statute (*f*). The action can be brought by the party grieved only; thus where this action was brought by the plaintiff for himself *and the queen*, judgment was arrested (*g*). A. being possessed of a lease of tithes, in right of his wife, as executrix of her former husband, granted "all his right, title, and interest" in the aforesaid tithes to I. S.; it was holden that the grant was good, and that I. S. might maintain an action on the statute for not setting out tithes (*h*). If an executrix of the lessee for years of a rectory marry, the husband and wife may join in an action on this statute (*i*). As the action on this statute is a personal action, tenants in common of tithe must join as plaintiffs. This action may be maintained *by* executors, for it is within the equity of the statute of the 4 Edw. third, which gives to the executor an action of trespass *de bonis testatoris*, but such action will not lie *against* executors (*j*).

Generally, as we have before seen, the person [261] intitled to the nine parts, at the time of severance, ought to set forth the tithe; and, if he fail in so doing, the owner of the tithe may sue him, although his interest in

(*f*) Wyburd *v.* Tuck, 1 Bos. and Pull. 458.

(*g*) Johns *v.* Carne, Moor, 911. Cro. Eliz. 621. S. C.

(*h*) Arnold *v.* Bidgood, Cro. Jac. 318.

(*i*) Beadles and wife, *v.* Sherman, Cro. Eliz. 613. Judgment affirmed on error, Greenwood's case, Clayt. 28. said per Twisden, J. to have been adjudged, 1 Sid. 407.

(*j*) Mr. J. Moreton's Case, 1 Ventr. 30. 1 Sid. 407. 2 Keb. 502. S. C. 1 Sid. 88. but see 1 Vern. 60.

the *land* be determined before the tithes were carried away, provided he remain owner of the *corn* (*k*).

If there be two joint-tenants, and one only enter and occupy, this action is maintainable against the joint-tenant who occupied alone (*l*). So if there be two tenants in common, and one of them sets out his tithe, and the other carries it all away, the action shall be brought against the tenant in common alone, who carried the whole tithe away (*m*).

If a person buy corn standing of the proprietor of a rectory, he must, as we have before seen (*supra* 23, 24. 65.), pay tithe, unless he has special words in the contract to discharge him from payment of tithe; and the carrying away of such corn, without setting out the tithe, will render him liable to an action on this statute (*n*). The statute having given treble damages, precludes the jury from giving other than special damages; and having given no costs, the jury cannot assess costs (*o*).

If a party intitled to tithes agree by parol with the occupiers of the land that they should hold the lands discharged of tithes for a certain time, or during the life of the tithe-owner, in consideration of the payment of a certain sum annually, an action of *indebitatus assumpsit* may be maintained by the tithe-owner against the occupier for the non-payment of the sum agreed on (*p*).

(*k*) Kipping *v.* Swain, Cro. Jac. 324. *supra*, 68.

(*l*) Cole *v.* Wilkes, Hutt. 121.

(*m*) Gerard's case cited, and said to have been adjudged, Hutt. 122.

(*n*) Selw. L. of Ni. Pri. 1091. 1093. Moyle *v.* Ewer, Cro. Jac. 361.

(*o*) Day *v.* Peckwell, Moore, 915. Gwill. 221.

(*p*) Selw. L. of Ni. Pr. 1070. Shipley *v.* Hammond, London sittings, H. 44 Geo. III. 5 Esp. N. P. C. 114.

Secondly. Tithes, as well as Easter offerings, (*q*) are also the subjects of the cognizance of courts of equity. Such jurisdiction, it has been long settled, belongs to the court of chancery (*r*). And the court of exchequer, as a court of revenue, has, on the equity side of it, always had an original jurisdiction over tithes (*s*). Tithes were always part of the possessions of the crown; and it is the peculiar province of that court to protect such property as belongs to the king; From the earliest reports, or records of the law it appears, that the court of exchequer has uniformly exercised this power over tithes; and even were the point problematical, the constant practice of that court for so many centuries would now warrant the exercise of such immediate and absolute jurisdiction; and, in either court, a suit may be maintained either for tithes, or a modus (*t*). A bill in equity lies to be relieved against the subtraction of predial tithes, notwithstanding that the subtraction of this species of tithes is a matter which, upon the above mentioned statute, 2 and 3 Edw. sixth, c. 13., may be relieved at law. (*u*). Nor is the minuteness of the value of the tithes demanded an objection to a party's asserting it in a court of equity, if his right to the tithes be controverted (*v*); for then he may properly institute a suit, in order to ascertain, and settle such right. But in a case in which no question of right was involved, and the tithe claimed was of very tri-

(*q*) Vernon *v.* Sloane, Gwill. 889.

(*r*) Anon. Gwill. 136. Toth. 285. Yate *v.* Southby, 1 Ch. Rep. 25. Gwill. 431. See also Browne *v.* Thetford, Gwill. 431. Anon. Gwill. 527. 2 Freem. 27.

(*s*) Gwill. 472. 1084. See Doble *v.* Potman, Hardr. 160. Gwill. 512.

(*t*) Anon. Gwill. 472, and see Mayne *v.* Beck, Sav. 30. Gwill. 155.

(*u*) Hele *v.* Pronte, Gwill. 509. See Cage *v.* Warner, Hardr. 182. Gwill. 513.

(*v*) Lewis *v.* Griffith, 4 Bro. P. C. 314. Gwill. 736.

vial value, it appearing, that the defendant had paid all his tithes to the plaintiff, except for six calves, for each of which, by custom only a halfpenny was due; the court of exchequer declared the bill to be vexatious, and ordered it to be dismissed (*w*).

A party cannot enforce in equity the payment of the treble, or double value of the tithes made payable by the statute (*x*); and it is usual, and was formerly held essential in the prayer of the bill for an account of tithes, expressly to waive the penalty, or forfeiture, and require only an account of the single value of the tithes demanded. However, in modern times, that strictness has been relaxed, and such express waiver held not to be requisite; and in a recent case (*y*), in which the bill wholly omitted it, but prayed an account of the single value of the tithes, the court held such omission to be immaterial, since the waiver, though not expressed, was necessarily implied: And it was always held, that if an executor of a parson brought a bill for tithes, though by his bill he do not offer to accept the single value, yet being only executor, and not the parson himself, he was not entitled to a forfeiture under the statute, and consequently was not obliged to waive it (*z*). So in a suit by a vicar for tithes, it is not necessary for him to set forth whether he claims by prescription, or endowment (*a*).

It is sufficient to sustain a bill for tithes by a layman, to state generally that he is entitled to them; and for a lay rector to set forth in the bill that he is seised of the impro-

(*w*) Griffiths *v.* Williams, Gwill. 549.

(*x*) See 3 Burn, Eccl. L. 501.

(*y*) Wood *v.* Walley, Gwill. 1383. 1 Anstr. 100.

(*z*) Anon. Gwill. 532. 1 Vern. 100.

(*a*) Button *v.* Honey, Hardr. 130. Gwill. 511. See also Stone *v.* Ludlow, Hardr. 321. Gwill. 514.

priate rectory, without shewing, that he had received the tithes (*b*).

A parson and vicar cannot join in one bill, and [264] suggest different moduses, because though the vicarage were originally derived out of the parsonage, yet the inheritances are now several, and divided, and therefore distinct bills should be preferred by them (*c*). A sequestrator alone cannot sustain a bill for tithes, because he is a bailiff, and accountable to the bishop, and has no interest in the subject (*d*); but the bishop and sequestrator must join in such suit (*e*): And, in case of the lunacy of the incumbent, the bishop and sequestrator cannot maintain a bill for the tithes, without making the incumbent, or his committee, a party (*f*).

Although a defendant may in equity insist on several species of defence, provided they be consistent, if he undertake to prove a general exemption, and prove merely one which is partial, he cannot have the benefit of the latter (*g*).

It is sufficient in an answer, if it give the plaintiff notice of the general nature of the case to be made against him (*h*).

To a bill for tithes the defendant pleaded a title to the

(*b*) Lowthero. Bolton, Gwill. 120.

(*c*) Anon. Gwill. 472.

(*d*) Berwick v. Swanton, Gwill. 537. Bunb. 192. See Sheffield v. Serjeant, Hardr. 102. Gwill. 503. Bishop of Norwich v. Bucklea, Gwill. 610. & supra, 35.

(*e*) Bishop of Norwich v. Eachard, Gwill. 610. See Jones v. Barret, Gwill. 657.

(*f*) Bishop of London v. Nichols, Gwill. 648. Bunb. 141.

(*g*) Leigh v. Mandsley, Gwill. 703. Bunb. 296.

(*h*) Baker v. Athill, Gwill. 1423. Anstr. 491. See Collard v. Newton, Bunb. 37. Gwill. 530. Langham v. Sparatowe, Hardr. 140. Gwill. 512. and Page's case, Hardr. 322. Gwill. 513. As to amending

tithes derived from a grant of king Henry the eighth, and that by divers mesne grants, conveyances and assurances, they became vested in the defendant: It was objected to this plea, that the several conveyances were not set out: But it was resolved by the court, that the plea would have been sufficiently certain at law, and that on the evidence the defendant would be found to deduce a regular title, and the plea was allowed (*i*).

In respect to the parties to such suit in equity, a bill may be brought by a parson for tithes against some of the parishioners, or by some of the parishioners against the parson, to establish a general modus (*k*). So it has been decided, that owners and occupiers of lands in a township may maintain such suit, on behalf of the other owners, and occupiers of lands in the same township, to establish a contributory modus, for all the lands there; though it was objected, that this not being a parochial modus, but merely for a particular district, could not be supported by one for himself and the other proprietors, but that all must be parties (*l*).

[265] Where the impropriator, or his lessee, files a bill to establish his right to tithes against the vicar, the patron of the vicarage ought to be made a party (*m*).

To a bill to establish a modus or customary payment in lieu of tithes, the ordinary is a necessary party (*n*).

answers to bills for tithes, see Berney *v.* Chambers, Bunb. 248. Gwill. 674. Montague *v.* ——, in not. ibid. Gwill. 715. in not. Gwill. 1125, 1231, 1242.

(*i*) Burslem *v.* Barbage, Gwill. 1324.

(*k*) 1 Atk. 283. Mitf. 145, 146. Offley *v.* Fanshaw, Gwill. 822.

(*l*) Chaytor *v.* Trin. Coll. Cambridge, 3 Anstr. 841. Gwill. 146.

(*m*) Calmell *v.* Sherratt, Gwill. 1171.

(*n*) Gordon *v.* Simpkinson, 11

If the defendant to a bill for tithes set up a title derived from J. S.; J. S. must be made a party to the suit (*o*).

On a bill filed by the lessor and lessee of a rectory for three lives, the lessor having made a derivative lease, for an account of tithes in kind, and to establish a custom of setting out the corn in stocks or stacks, it was objected, that the plaintiff having made such derivative lease, was not entitled to any account, and could not maintain a bill to establish the custom, which is a mere right; but lord Hardwicke, C. overruled the objection, observing that such a suit prevents collusion between the lessees and occupiers, and is properly instituted by the p arties entitled to the inheritance (*p*).

Where a rector of one parish claimed tithes in kind out of a whole liberty, and another a money payment out of a part of it, the owner of the *greater* part of the liberty and his tenants filed a bill to have the modus established, and that the two rectors might interplead, and that a commission might issue to ascertain what lands in the liberty were within the one parish, or the other: The court held, that the other owners of the lands in the liberty ought to have been parties (*q*). In a like manner, to a bill for a portion of tithes in a neighbouring parish, the vicar of that parish must be a party (*r*). A bill lies to perpetuate the testimony of witnesses to prove a modus (*s*). But a bill cannot be sustained to support a modus,

Ves. jun. 509. See also Gwill. 1597.

(*o*) White *v.* Friend, Gwill. 1096. Philips *v.* Prytherick, Gwill. 1125.

(*p*) Archbishop of York and Dr. Hayter *v.* Sir Miles Stapleton, 2 Atk. 136. Gwill. 772.

(*q*) Wollaston *v.* Wright, Gwill. 1454. Anstr. 1801.

(*r*) Bailey *v.* Worrall, Gwill. 632. Bunb. 115.

(*s*) Somerset *v.* Fotherby, Gwill. 534. 1 Vern. 185. and see Offley *v.* Fanshaw, Gwill. 822.

which is not disputed (*t*), or on a simple demand for tithes without suit (*u*). Nevertheless if an action at law be brought by the lessee of tithes for subtraction of them, that is a sufficient ground for filing a bill to establish a modus (*v*).

A modus shall not be established in equity against a parson without a trial at law, if he desire an issue (*w*); but if on a bill filed to establish a modus, he decline trying its validity at law, he shall be decreed to accept the same in [266] future (*x*). If in a suit in equity the validity of a modus is referred to a court of law, it must be taken for granted, that the fact of its having immemorially existed is admitted, and that the only consideration is, what objection will be made to it in point of law for the want of certainty, equality, or of any other properties, which are essential to make it good (*y*). Where on a bill for tithes, a modus is proved different from that stated in the answer; on the one hand, an issue shall not be granted, if the parson resists it (*z*); and on the other, there shall not be a decree for tithes in kind, which the modus affects to cover (*a*): Or if in case of such suit, no particular modus is mentioned in the bill, or alleged by the answer, yet if the plaintiff's own witnesses shew a reasonable ground for

(*t*) Wollaston *v.* Wright, Gwill. 1454. Anstr. 1801. Earl of Coventry *v.* Burslem, Gwill. 1596.

(*u*) Gordon *v.* Simpkinson, 11 Ves. junr. 509.

(*v*) Lord Stawell *v.* Atkins, Gwill. 1434. Anstr. 564.

(*w*) Webber *v.* Taylor, Gwill. 656. See Anon. Nels. Rep. 10. Gwill. 436. Robinson *v.* Barroby, Gwill. 1173.

(*x*) Cleeves *v.* Kynston, Gwill. 1048.

(*y*) Pike *v.* Dowling, Gwill. 1166. 2 Bl. Rep. 1257.

(*z*) Bishop *v.* Chichester, Gwill. 1816.

(*a*) Scott *v.* Fenwick, Gwill. 1252.

a modus, the court will not proceed to decree an account of tithes (*b*). Where a modus is alleged generally, and without any restriction, the court cannot direct an issue to try a modus with a restriction (*c*); but the court is not concluded from directing an issue to try a modus by a decree for an account in a former cause, in which the same modus was insisted on, but no issue directed upon it (*d*).

In a suit for tithes in the court of exchequer, the decree is, that the defendant shall account for and pay what tithes were due at the time of filing the bill: In the court of chancery the decree directs such account and payment to the time of the master's report (*e*).

It has been held that the statute of limitations is not pleadable to a bill for tithes, because the defendant is as to the tithes in the nature of a receiver, or bailiff, in which case that statute has no operation (*f*). It is, nevertheless, discretionary in the court how far they will carry the claim back. After a great lapse of time they will refuse the account altogether (*g*), and will in no case carry it further back than six years (*h*).

A bill may be maintained for partition of tithes; and

(*b*) Ekins *v.* Dormer, Gwill. 800. 2. 3 Atk. 534.

(*c*) Ibid.

(*d*) Collins *v.* Sir Henry Gough, Gwill. 1294.

(*e*) Archbishop of York *v.* Sir Miles Stapleton, 2 Atk. 136. Gwill. 773. Bell *v.* Read, 3 Atk. 590. Gwill. 804. Carleton *v.* Brightwell, Gwill. 676. 2 P. Wms. 462. Bell *v.* Read, Gwill. 804. 3 Atk. 590.

(*f*) Marston *v.* Claypole, Gwill. 674.

(*g*) Monoux *v.* Jones, Gwill. 1582.

(*h*) Gerrard *v.* Scholiar, Gwill. 1045.

though in support of a demurrer to a bill for the partition of great tithes, of several parishes, held by the plaintiff and defendants as tenants in common, it was insisted that tithes being incorporeal, and indivisible in their nature, no partition could be made of them in severalty but by metes and bounds, which could not be fixed on the lands out of which they issue, without the consent of the owners of the lands; and that placing such bounds independently of the metes and bounds of the several parishes, must create great confusion; so that, whether they were, or were not indivisible, in legal estimation; a court of equity ought not in such a case to decree a partition without the consent of all parties concerned, but leave the plaintiff to a writ of partition at law; yet the Lord Chancellor overruled the demurrer (*i*).

If in a suit for tithes, a question of tithe be involved, and the evidence of possession doubtful, the Court will not make any decree till the right has been settled at law, the account being merely consequential to the right; and in such a case the Court refused to direct an issue, but ordered the bill to be retained for a year, with liberty for the plaintiff to proceed at law (*j*).

Defendants to several bills for tithes may move to consolidate the suits, but such motion must be grounded on an affidavit that they do not defend by common subscription (*k*), for it is maintenance for parishioners jointly to contribute to the expence of defending a suit for

(*i*) Bagster *v.* Knollys, Gwill. 826.

(*j*) Manby *v.* Edmead, Gwill. 1265. See also Bowsher *v.* Morgan, 2 Anstr. 404. Gwill. 1416, and Garnons *v.* Barnard, Gwill. 1462, and supra, 57.

(*k*) Pyke *v.* Brook, Gwill. 1345.

tithes, and a demurrer will lie to a bill seeking a discovery of an agreement to that effect (*l*).

III. I proceed now to consider the nature of the [267] evidence, which is adduced in suits and actions relative to tithes.

Where the tithes have been taken by the defendant under an agreement, and composition with the plaintiff, an action of assumpsit on the contract is the proper remedy; and no farther evidence is necessary in that case, than of the occupation of the defendant, his contract with the plaintiff, and the retaining of his tithes in consequence of such contract. But where there is no existing contract, and the farmer has neglected to set out his tithes, or has made a fraudulent and colourable severance of them, and then carried them away, the tithe-owner may, as we have just seen, bring an action of debt for the treble value of such of the tithes as are predial (*m*).

In ordinary cases (*n*), it will be sufficient in this action for the plaintiff to prove himself in possession of the rectory, or tithes, without entering into his title; as where he has been for some time in the uninterrupted receipt of tithes from the different land-holders in the parish, and no one has disputed his title (*o*). But in cases where no acknowledgment of his title has taken place, he must prove it. If he claim as parson (*p*), he must prove his ordination by the bishop; his institution, and induction into the living; and as it is asserted in some books, his

(*l*) Oliver *v.* Bakewell, Gwill. 1381.

(*m*) Peake's L. of Ev. 411. supra, 258.

(*n*) Bull. N. P. 188. supra, 16.

(*o*) Chapman *v.* Beard, Gwill. 1482. Radford *v.* Mackintosh, 3 T. Rep. 635.

(*p*) Bull. N. P. 188.

subscription to the declaration in the act of uniformity in the presence of the bishop; and his reading the thirty-nine articles within two months, and declaring his assent to them. This latter evidence however does not now seem [268] to be strictly necessary, until some ground is laid by the defendant, that the plaintiff has not complied with those requisites; for the presumption, is that every man has conformed to the laws, unless there be some evidence to the contrary. Thus fifteen years' possession of a benefice was held to be *primâ facie* evidence of a regular induction, and having read the thirty-nine articles; and no stress was laid on the testimony of several persons, who stated, that they had generally attended Divine service for the two months next after the plaintiff's becoming rector, and that none of them had heard him read the thirty-nine articles, or had heard of his reading them; the court observing that there was no evidence to shake the legal presumption in favour of the incumbent; that it was not shewn, that any witnesses attended all Divine service on each Lord's-day for two months after the plaintiff's induction, and deny his having read the articles during that time. The circumstance of these witnesses not having heard him do so on those days when they happened to attend is nothing; unless they can answer for each time that Divine service was performed in the two months: That if there had been any want of title, the parishioners should have complained to the bishop, or disputed it while the memory of the thing was recent: That there is no record, or repository for the evidence of induction or of reading the articles, and the witnesses cannot live for ever: That if those facts are not to be presumed from length of time, that circumstance, which strengthens all other titles, will but serve to weaken or destroy this (*q*).

(*q*) Chapman v. Beard, Gwill. Harris v. Adge. Gwill. 560. 1482. 3 Anstr. 942. And see

If the plaintiff sue as a lay impropriator, the strict proof of title is to shew that the rectory originally belonged to one of the dissolved monasteries, and was granted by the crown to those under whom he claims (*r*); but as [269] deeds and instruments are liable to be lost, length of possession, and old deeds conveying tithes, have been deemed sufficient evidence of title (*s*). When the plaintiff sues as farmer of the tithes, he must prove a lease by those under whom he claims (*t*); and the mere circumstance of the plaintiff's having, as farmer of the tithes, called a meeting of the parishioners to treat with them for a composition, when no agreement took place in consequence, is not sufficient, though no one at that meeting disputed his title (*u*).

The plaintiff must then prove the defendant's occupation of land within the parish; his taking away the tithes; and the value of them; and if there has been any agreement for composition, he must shew such composition to have been discharged by six months' regular notice expiring at the end of the year, in the same manner as in the common case of a tenancy from year to year (*v*). On this evidence the lands will be presumed to be chargeable, unless the contrary be shewn on the part of the defendant; and though they have never paid tithes, that alone will furnish no defence, if the declaration state that tithes were yielded and *payable* within forty years next before the passing of the statute, 2 and 3 Ed. VI. c. 13. (*w*); though in a case in which the declaration merely stated that they were

(*r*) Vid. Com. Rep. 651.

(*s*) Kynaston *v.* Clarke, 5 T. R. 265. Gwill. 960.

(*t*) Bull. N. P. 188. Bishop *v.* Chichester, Gwill. 1316. 1 Bro. Ch. Rep. 161. Peake's L. of Ev. 412, 413.

(*u*) Wyburn *v.* Tuck, Gwill. 1517.

(*v*) Vid. *supra*, 123, 124.

(*w*) Mitchell *v.* Walker, 5 T. Rep. 260.

yielded, and *paid* within forty years next before the statute, some evidence of payment was required (*x*). And [270] though a layman cannot prescribe in a *non decimando*; yet if the tithes belong to a lay impropriator, and the land in question has been constantly ploughed, and no tithe paid, it may be ground for the jury to presume a grant by him, and severance of the land from the rectory: In this case, therefore, it will lie on the defendant to shew, that it has been constantly before in a state of tillage (*y*).

In cases where the lands are discharged from tithes by a modus, the evidence will be of the same nature as in all other cases of custom, to which I have above alluded (*z*). But where the defendant contends, that the lands are wholly exempt from tithes, he must shew the ground of discharge; for the mere circumstance of their not having been before charged is not sufficient, because a layman cannot set up a prescription *de non decimando* without deducing his title from some ecclesiastical person; though he may set up a modus without any such aid (*a*): And evidence of a modus will support a plea of *nil debet* to an action of debt for tithes of hay and corn (*b*).

Where the exemption from tithes is claimed of lands belonging to the monasteries dissolved by the statutes 31 Henry the eighth, c. 13. and 32 Henry the eighth, c. 24. such lands must be shewn to have belonged to a religious house dissolved by one of those statutes; and that

(*x*) Lord Mansfield *v.* Clarke, cited *ibid.* 264.

(*y*) Vid. Com. Rep. 648. 3 Atk. 628. 5 T. Rep. 264. Peake's L. of Ev. 414.

(*z*) Supra, 148, 149.

(*a*) Peake's L. of Ev. 414.

(*b*) Chary *v.* Garland, Gwill. 951.

while in the possession of such house, they were exempt from tithes.

The mere circumstance of lands having belonged [271] to a monastery so dissolved is *primâ facie* evidence, that they immemorially held it so discharged, unless it be proved, that the land has paid tithe. In like manner, where the exemption is claimed on the ground of unity of possession by the religious house of the parsonage, and of the land, if the unity be proved, and the time of the union cannot be ascertained, and there is no evidence of tithes having been paid, the presumption will be in favour of its exemption (*c*).

The fact of lands having belonged to a monastery is generally proved by the survey of their lands, at or soon after the time of their dissolution, or by some other public documents, most of which are to be found, either in the Augmentation-office, or Chapter-house.

In such cases the pope's bull of exemption may be proved by the bull itself; or by an exemplification of it under the bishop's seal and proof that the lands in question belonged to those, who are mentioned in it (*d*).

To prove a composition real, the deed by which it was entered into must, as we have before seen (*e*), be proved, or evidence shewn from which it may be inferred, that such deed did once exist.

Books of account, and memoranda of a preceding rector, or vicar, relative to tithes, are constantly received in

(*c*) Peake's L. of Ev. 416, 417. 701. Bunb. 284.
(*d*) Peake's S. of Ev. 89, 414, 417. Vid. Benson *v.* Olive, Gwill.
(*e*) Supr. 221.

evidence to support the demands of his successors (*f*). [272] In like manner, as we have seen (*g*), books of former lessees of a rectory containing entries of the receipt of agistment tithe after the determination of their leases, have been admitted to support the claim of the impropriator to that species of tithes; although in such case the admissibility of that evidence were strongly controverted; the court holding, that the case of the parson's book was not the only exception to the general rule; that any other case falling within the same principle would be an exception; and they decided that principle to be applicable to the case before them (*h*). So a book of a former collector of ancient date found in the hands of his successor was admitted in evidence, even though the handwriting of the collector could not be proved (*i*). A survey of a religious house, taken in the year 1563, was allowed good evidence to prove a vicar's right to small tithes (*j*). Copies from the cathedral churches of the surveys of crown and church lands, made under the commissions issued by the parliament in the year 1647, were held to be admissible evidence, the originals having been lost in the fire of London (*k*). Evidence of the perception of the tithe of hay, and of small tithes by the vicar, is evidence of a prescription, which supposes an endowment (*l*). And

(*f*) Lord Arundel's case, Gwill. 620. 12 Vin. Abr. 255. pl. 3. Legross v. Lovemore, Gwill. 529. See also Gwill. 653. Benson v. Olive, Bunb. 284. Gwill. 701. Fynes v. Ordoyno, Gwill. 1168. and supra, 149.

(*g*) Supra, 148, 149.

(*h*) Illingworth v. Leigh, Gwill. 1615.

(*i*) Jones v. Waller, Gwill. 847. See also Kynaston v. Hattersley, Gwill. 893.

(*j*) The vicar of Kellington v. Master and Fellows of Trin. Coll. Camb. 2 Gwill. 599. 1 Wils. 170. See also Gwill. 1347.

(*k*) Underhill v. Durham, Gwill. 542. Freem. 509.

(*l*) Travis v. Oxton, Gwill. 1066.

proof of one single instance within thirty years of a composition with the vicar for agistment tithe of the close in which it was claimed, was held sufficient to entitle him to the small tithes, on a bill filed by him for tithe herbage, and furze (*m*). Even proof of the payment and receipt of a bad modus is evidence of a title to [273] tithes in kind: For it amounts to proof of payment of a temporary composition in lieu of the tithes demanded, which is evidence of enjoyment, which is proof of an endowment, which consequently is a title to the tithes themselves (*n*). Where no endowment appears, yet evidence, which will not support a prescription, may be adduced to prove an endowment: for endowments of vicarages have in general, if not all of them, been made within time of legal memory. Many of them are lost, and can be proved only by usage. It were unreasonable to expect in such cases proof of a prescriptive right (*o*). And if to a bill for tithes by a vicar, the defendant in his answer admits the plaintiff to be entitled, but insists on a special exemption, the plaintiff is not obliged to shew any special title, either by endowment or prescription (*p*).

Written evidence expressing an interest in all, and all manner of tithes, was admitted in support of a claim of a portion of tithes, though in none of the instruments adduced a portion of tithes was mentioned (*q*).

A copy of an agreement between the Abbot of Quarr, and the monks of Lyra, was offered in evidence; and though

(*m*) Goole *v.* Jordan, Gwill. 648. Bunb. 144.

(*n*) Travis *v.* Oxton, Gwill. 1074.

(*o*) Jackson *v.* Walker, Gwill. 1231. See Devie *v.* Lord Brownlow, Gwill. 1128. & Bree *v.* Chaplin, Gwill. 1033.

(*p*) Pye *v.* Rea, Bunb. 72. Gwill. 628.

(*q*) Downes *v.* Moreman, Bunb. 189. Gwill. 658.

it was objected, that it could not be read, being neither a record nor a public matter; yet on a copy of the statutes of Oxford being produced, prohibiting the removal of any book, or document, from the Bodleian Library, the Court received it (*r*).

On a bill for tithes, and a modus set up by the answer, a former bill by the rector against an occupier, and his answer setting up a different modus were offered to be read in evidence; and the court held them to be admissible, if the lands could be identified (*s*). Depositions taken in a former cause between the same parties, in which the same question was in issue, were admitted to be read (*t*). And on the trial of an issue, whether the vicar was intitled to agistment tithe, depositions in a suit by a former lessee, and an occupier, were offered in evidence without producing either the bill, or answer: It was objected that without the bill, and answer, or proving that all due diligence had been used to discover them, but without effect, and giving collateral proof of their contents, these depositions could not be received; that it was necessary to produce the bill and answer in order that it might be seen who the parties were, and what were the questions in issue between them; because the depositions [274] themselves could be evidence only between the same parties, or those claiming under them, and upon the same point; that it was clear from the depositions themselves, that the vicar was not a party to the suit, because he was examined as a witness; that the suit, therefore, was, as to him, *res inter alios acta;* that the only ground on which it could be contended they might be admitted was,

(*r*) Downes *v.* Moreman, Bunb. 1239. 1189. Gwill. 658.

(*t*) Morgan *v.* Nevill, Gwill.

(*s*) Ashby *v.* Power, Gwill. 1046.

where hearsay or reputation was evidence; that hearsay could not be evidence in this case, because it was to prove a particular fact; that the very depositions themselves were confined to the claim of agistment tithe in a particular place, and did not affect to speak of the general custom of the parish. The judge was clearly of opinion, that they were inadmissible; and accordingly rejected them. A new trial was nevertheless granted by the court of exchequer, on the express ground, that the judge was mistaken in rejecting the above evidence, and upon a second trial a verdict was found for the impropriatrix (*u*).

But where a parson filed a bill against several parishioners, and they filed a cross bill against him, and stated the deposition of a witness then dead in a former cause between the parson, and another parishioner on the same point, the court would not permit it to be read, though the parson, alleging he did not recollect its contents, referred to it in his answer (*v*).

A verdict between a parson, and one occupier, is evidence upon a like point between the parson, and another occupier, though it was objected, that this was *res inter alios acta*; but the court said, that in these cases, a decision between a vicar and one occupier was [275] evidence in a case between the vicar and another occupier, and to exclude the evidence would end in the exclusion of nine-tenths of the evidence, in that, and in all similar cases; but that the evidence was, at the same time, open to all imputation of fraud, collusion, or mistake (*w*);

(*u*) Illingworth *v.* Leigh, Gwill. 1369.

(*v*) Scott *v.* Allgood, Gwill. 1238 1615.

(*w*) Travis *v.* Chaloner, Gwill.

and a verdict not proved to relate to the same lands shall not be received as evidence (*x*).

In respect to a terrier, which is frequently adduced in evidence in cases of this nature, it is an instrument well known in the law; by the canons it is directed, that an enquiry shall be from time to time made of the temporal rights of the clergymen in every parish, and returned into the registry of the bishop, the proper guardian of those rights, for his information; that return, which generally has the minister's signature, is denominated a terrier, and derives its authenticity from being found in the proper place; that place is the bishop's register office (*y*), or the registry of the archdeacon of the diocese (*z*); and unless it come from one of those quarters, it cannot be admitted as evidence: therefore, it has been decided, that a paper purporting to be a terrier found in the charter chest of Trinity-college, Cambridge, who were landholders in the parish, was no evidence to disprove a modus (*a*). But as against one of the prebendaries of Litchfield, a terrier found in the registry of the dean and chap-
[276] ter of Litchfield, was held sufficient evidence (*b*); for though, in general, an ancient manuscript, the actual execution of which cannot now be otherwise proved, receives authenticity from its being found in that place, in which such an instrument ought properly to be deposited; yet where a connection can be established so as reasonably to

(*x*) Benson *v.* Olive, Gwill. 702.

(*y*) Atkins *v.* Hatton, Gwill. 1406. 2 Anstr. 386. See also Lloyd *v.* Mortimer, Gwill. 1064. 1593. and 3 Burn, Eccl. L. 379.

(*z*) Potts *v.* Durant, Gwill. 1450. 3 Anstr. 789.

(*a*) Gwill. 1406.

(*b*) Miller *v.* Foster, Gwill. 1406. in not. Vid. Peake's L. of E. 88.

account for the custody in which the instruments are found, the courts have somewhat relaxed the rule, and admitted them to be read, though not coming from exactly the most proper repository; thus in the case which I have last mentioned, the court of king's-bench proceeded on the ground of the connection between the terrier, and the custody in which it was found; and a strong corroborating circumstance in that case was, that the terrier was found annexed to an old lease of the prebend of nearly the same date. But when the custody is merely private, and unconnected with the subject matter, the courts have never gone the length of admitting such papers in evidence: Thus an instrument purporting to be an endowment without the seal, and another purporting to be an *inspeximus* thereof under the seal of the bishop, were rejected as evidence, inasmuch as they came out of the hands of a private person wholly unconnected with the matters contained in them (*c*). It has also been held, that as against the parson, a terrier is in all cases strong evidence; but it is never admitted for him, unless it be signed by the churchwardens; and in case they are of his nomination by some of the substantial inhabitants of the parish also; and in the case of a bill filed by a vicar against the impropriatrix of a rectory, the principal object of which was the recovery of agistment tithe, in support of the claim, several terriers were produced, some of which stated the vicar to have all small tithes generally, and others [277] gave him expressly, and in terms, the herbage of barren cattle. The former of these terriers was signed by the churchwardens only: And it was objected first, that it was no terrier at all, because made by the churchwardens only, and not signed by the vicar: that the minister's signature was essential to give the instrument the character of a

(*c*) Potts v. Durant, Gwill. 1450. 3 Anstr. 789.

terrier; that where it wanted that signature, the court had often refused to receive it, though it came from the minister himself: 2dly, that even supposing it to be a proper terrier, yet that it could not be admitted in evidence in that cause, as against the rector, because not signed by any person claiming under, or on the part of the rector. But the court were of opinion, that the terrier was admissible, for that it had been recognized in the character of a terrier by the spiritual court: that such imperfect terrier had been often received of late in the court of exchequer: that it was true lord C. B. Skynner had once rejected it, but that he had afterwards changed his opinion, and since that time it had been uniformly received; that the terrier in question was signed by persons not only in no respect interested; but whose duty it was from their official situation to sign it, and that the want of the vicar's signature made it stronger evidence in his favour (*d*).

Where a terrier described the modus to be for all mowing grass, except clover and the like, it was objected, that as the article excepted was not known beyond time of memory, a modus containing that exception must be modern; but the court thought that the expression in the terrier, was not to be taken as an exception annexed to the modus, but merely as a memorandum, that the modus covered natural hay only, and did not extend to modern artificial grasses (*e*).

On the trial of an issue whether the defendant by himself or his agents was in possession of a certain number of acres of glebe lands belonging to the plaintiff, as rector

(*d*) Illingworth *v.* Leigh, Gwill. 1615. See Bull. Ni. Pri. 248.

(*e*) Franklin *v.* Spilling, 3 Anstr. 760. Gwill. 1444.

of certain parishes therein mentioned, a map made under the directions of the lord of the manor for the time being, was produced by the defendant, the then lord of the manor, and was held to be unexceptionable evidence as against him (*f*).

In most cases, it would be absolutely impossible [278] after a great length of time to prove the execution of a deed, or even the hand-writing of the parties. It is necessary that a period of limitation should be fixed, otherwise new questions would daily arise; and therefore courts of justice have laid it down as a rule, that a deed of above *thirty* years' standing requires no farther proof of its execution than the mere production of it, provided the possession has been according to the provisions of the deed, and there is no apparent erasure or alteration on the face of it (*g*).

A decree made between the same parties, on the same point, not appealed from, but signed and inrolled, is conclusive; and the rule is founded on sound policy which requires that the decrees of courts of justice should not be repugnant to each other on the same point of right: But a decree which is to have this conclusive effect must be made between parties, who have a competent interest in the subject of it: therefore, in a suit by a vicar against occupiers for an account of all small tithes, a decree in a suit instituted in that court by the then vicar, in the reign of Charles the first, declaring the plaintiff to be entitled to all small tithes under the endowment, was held not to be thus conclusive; the court observing, that the suit, in which

(*f*) Allott *v.* Wilkinson, Gwill. 1585.

N. P. 255, 265. See also Benson *v.* Olive, Bunb. 284. Gwill. 70.

(*g*) Peake's L. of E. 109. Bul.

that decree was pronounced, was between the vicar, and the impropriator, who was the patron; that one of the parties had an absolute right, but the vicar, though he had the freehold of the vicarage, had no interest beyond his own incumbency: As vicar he could do no act to bind the interests of his successors in the vicarage: Before the [279] restraining statutes, he could not have affected those interests without the concurrence of the ordinary, as well as of the patron: That reason and policy alike require that the ordinary should be a party to a suit, the end of which is to bind and conclude those interests, which the law hath appointed him to watch over and protect; and though the decree which was so pronounced, was in favour of the vicar's claim, yet if there were not parties sufficient to sustain the suit, the decree pronounced in favour of the vicar could be no more conclusive than if it had been to the prejudice of his claim; considering the decree in this light, it has no more force, in respect to the successors of the vicar, who was a party to it, than a decree for an account of tithes (*h*).

But in a suit by the rector for tithes, in which the defendants insisted, that the lands were parcel of one of the greater monasteries dissolved by the stat. 31 Hen. eighth, a decree was offered to be read in evidence, in which the lessee only, and not the impropriator, was a party; an objection was taken to the reading of it, for that no admission of the lessee shall bind him who has the inheritance, and who was no party to the decree: Lord C. B. Montague, and baron Price, were of opinion, it should be permitted to be read, stating that they should have made no doubt of reading it, if the lessee had prevailed, and therefore that they saw no reason why it should not be read,

(*h*) Carr v. Heaton, Gwill. 1258.

since he did not prevail: but baron Page was of opinion, it ought not to be read, which it seems would have been the more correct adjudication (*i*). It is generally true, that a decree shall not be read, if it do not relate to the [280] same lands and title as are in question (*j*).

The king's books are conclusive evidence of the value of a living: Thus, where the defendant to a bill for tithes insisted, that the plaintiff had taken a second living above the value of eight pounds a year, the defendant was decreed to account; for though the value were in reality above eight pounds a year, yet it being under that value in the king's books, they were held conclusive (*k*). But ancient valuations are not conclusive evidence of the value either of lands or of livings (*l*).

We have before seen, that mere non-payment of tithes, although from time immemorial, is no discharge, without shewing some special ground of exemption (*m*). But in a case, in which the plaintiff rested on his common law right of rector, and the defendant insisted, that the lands he occupied were formerly part of lands of the dissolved monastery of Shaftsbury, and exempt by prescription, and shewed the rector not in the perception of all the tithes: a vicar in possession of some; tenants of the site of a manor, and certain demesnes, in possession of others; and also other lands, a whole floor, paying none at all: the court held the inference from that evidence to be, that the rector's right was very precarious, and that it let in

(*i*) Bishop of Lincoln v. Sir Wm. Ellis, Gwill. 632. Bunb. 110.

(*j*) Benson v. Olive, Gwill. 701. Bunb. 284.

(*k*) Stump v. Ayliffe, Gwill. 536. See Dy. 237. Cro. Eliz. 853. Cro. Car. 456. 2 Lutw. 1365. 17 Vin. Abr. 362.

(*l*) Gwill. 857. 1240. 1347.

(*m*) Supra, 164.

every reasonable title, which the evidence would support: That a portion might exist against him; and that the defendant deriving title to exemption from spiritual persons, [281] might apply it to prescription (*n*). But it seems that such exemption is not applicable to a composition real, or other particular title, without some specific evidence (*o*); yet although immemorial non-payment of any tithes from a district cannot raise a presumption of an exemption by grant from a lay rector, yet it is strong evidence to explain the extent of the grant of the rectory, if it be in any degree doubtful (*p*).

Payment of a composition for the tithes of turnips, whether pulled or eaten off the ground, where neither party considered it as an agistment tithe, was held to be no evidence of perception of that species of tithes (*q*).

Receipts for the payment of tithes not signed by the receiver of the tithes himself, but merely by his deputy, have been held to be inadmissible evidence (*r*): And where a modus of every tenth day's cheese for a certain period of the year, in lieu of tithe of milk, was insisted on; proof of the delivery of cheese at the house of the tithe-gatherer, but not to himself, was not admitted as evidence to prove perception of the modus; for the tithe-gatherer's authority is personal; the act of any other person not authorised by the clergyman cannot bind his right (*s*).

(*n*) Fryer *v.* Sims, Gwill. 1356.

(*o*) Ibid. and vid. Haywood *v.* Nicholls, Gwill. 1120.

(*p*) Lord Petre *v.* Blencoe, Gwill. 1484.

(*q*) Gwill. 1462.

(*r*) Yate *v.* Leigh, Gwill. 861.

(*s*) Wake *v.* Russ, Gwill. 1396. 1 Anstr. 295.

Although on the trial of an issue directed by a court of equity respecting a modus, the evidence on the defendant's part proved a modus to extend to more closes than were stated in the pleadings, that was held not ma- [282] terial, and the defendant had the benefit of the proof (*t*).

The testimony of persons, though not parties to the suit, yet if they are interested in the general question, shall be rejected; a rule of evidence, to which I have above alluded (*u*). Thus to prove an exemption from the payment of tithe wood within the weald of Kent, all those of whatever condition, or reputation, who, either as owners, or farmers, were entitled to any wood there, were held incompetent witnesses: for the custom being alleged to be general through the whole weald, though they were not parties to the suit, yet, inasmuch as the custom concerned them in their private profit, they were *quasi parties*, and their testimony *quasi in propriâ causâ* (*v*). On the same principle, in the case of a modus claimed for a whole vill, all those within the vill, as parties in interest, though not to the action, have been held inadmissible (*w*). The custom of tithing in other parishes than that in question cannot be given in evidence (*x*). Whether evidence of a general right can be applied in support of an allegation of a partial right seems doubtful; as where the plaintiff, in a bill for tithes in kind, alleged his title as vicar of the parish, and as such entitled by endowment, prescription, usage, or otherwise to the tithes in question *in the townships of G. S. and L. S.* and the tithable places thereof; in support of this allegation, proof was offered

(*t*) Taylor *v.* Waller, Gwill. 699. Bunb. 267.

(*u*) Supr. 149.

(*v*) Earl of Clanrickard *v.* Lady Denton, Gwill. 360.

(*w*) Ibid.

(*x*) Erskine *v.* Ruffle, Gwill. 961.

of the payment of tithe hay *in all other parts of the parish*; namely, in kind, where no tilth penny, and a tilth [283] penny, where none in kind: But it was objected that this proof was not admissible in support of this allegation, for that it was evidence *of a general right throughout the parish*; whereas the allegation was *of a different right*: that is, *a portion of the tithes in the townships named*, and that the defendants might by such means be misled into a defence against a title very different from the title alleged by the plaintiff: But the court, without disposing of this objection, gave judgment in favour of the plaintiff, there being other evidence in the cause sufficient to support his claim (*y*).

In a suit instituted in the Court of Exchequer by the lessees of a vicar for the subtraction of tithes, the plaintiffs gave very forcible and weighty evidence, and that pointing to particular facts: On the other side there was general evidence, which went to a general contradiction, or denial of the particular evidence adduced by the plaintiffs: The Court was strongly pressed on the part of the Plaintiffs to decide the cause without the intervention of a jury; But though the Court admitted, that the decision must be in favour of the plaintiffs, as the matter then stood, yet inasmuch as the bill on the ground of fraud stated generally inferior value, secreting, unseasonable hours, and the like, on which there was issue and proof, and the plaintiffs proved general allegations by particular facts, the defendant could encounter that evidence only in a general way, being unable to anticipate the particular facts; consequently if the Court were to give the plaintiffs credit as to proof of particular evidence, justice would not be done to the defendant, and therefore held

(*y*) Travis *v.* Chaloner, Gwill. 1237.

an issue to be requisite; but to lessen the difficulties of an action arising from the length of time, and the minuteness of the articles, confined the issue to a period of two months, leaving the rest to abide the result, because by the whole case it appeared, that the course of setting out the tithes during the whole time was the same (*z*).

IV. In respect to the costs of suits for tithes, it is a settled rule, that on a bill of experiment, if the plaintiff fail, he shall pay costs (*a*). So if the plaintiff file two bills against two persons, where the question might have been decided upon one bill, and does not succeed, both bills shall be dismissed with costs (*b*).

If to a bill for tithes, the defendant in his answer insist upon a tender before the commencement of the suit, and if, on the cause proceeding to a hearing, the defendant is unable to surcharge the complainant, the court will decree the defendant to pay the sum tendered, and dismiss the bill with costs (*c*).

But if the sum due exceed the sum tendered, the costs shall be paid by the defendant (*d*).

In a case in which the defendant tendered five [284] pounds to the plaintiff, desiring him to take his tithes out of the money, the court declared this to be no good tender (*e*). Where the plaintiff submitted to a demurrer,

(*z*) Evans *v.* Green, Gwill. 1190.

(*a*) Fryer *v.* Sims, Gwill. 1356. vid. Strutt *v.* Baker, ibid. 1430. 2 Ves. jun. 625.

(*b*) Caley *v.* Williamson, Gwill. 1123.

(*c*) Hawkins *v.* Harkness, Gwill. 868.

(*d*) Worral *v.* Nichols, Gwill. 1302.

(*e*) Drake *v.* Brooking, Gwill. 594. vid. Rumney *v.* Willis, Ibid. 775.

and then amended his bill, and before the amendment, the defendant tendered the tithes, the court decreed the money tendered, but made the plaintiff pay the costs of suit (*f*). On a bill for tithes, the defendant having answered, and admitted the plaintiff's right to tithes, and stated what he alleges to be due from him, may move, as of course, that the plaintiff may accept what is so due, with costs to that time, or proceed to the peril of costs; the motion does not require notice, the answer is sufficient to support it, but the order, when made, must be served (*g*): But a defendant cannot make *such* motion till the answer be filed, for till the answer, and discovery be made upon it, the defendant has no means of knowing whether the sum tendered be the whole, or not, nor whether he ought to accept the money paid in (*h*). If the defendant admit the right to some part of the tithes claimed, and resist the demand for another part, he will not be permitted to pay into court the value of what he admits, unless on the payment of the whole costs then incurred (*i*).

As to part of a demand for tithes, the defendant by his answer tendered ten pounds, with costs to the time of the answer; at the hearing, the court decreed a trial at law as to the other part, and reserved further directions: after the trial, the court dismissed the whole bill, except as to [285] the ten pounds, which they decreed the defendant to pay with costs to the time of the answer inclusive, and

(*f*) Henning *v.* Willis, Gwill. 899.

(*g*) Parker *v.* Turner, Gwill. 1422. See Anon. Gwill. 618 and 626.

(*h*) Hull *v.* Matthews, Gwill. 1422. 2 Anst. 441. See Bishop of Exeter *v.* Trenchard, Bunb. 47, Gwill. 626.

(*i*) Worrall *v.* Miller, Gwill. 1436. 3 Anst. 632.

no farther; and that from the time of the tender, the plaintiff should pay to the defendant the subsequent costs of suit; which subsequent costs were to be allowed to, and deducted by, the defendant out of the costs which should be taxed, and allowed the plaintiff, so far as the same would extend; and the residue of the defendant's costs were to be paid by the plaintiff (*j*).

On a bill to establish a modus, if the defendant decline an issue, the modus shall be established, and the plaintiff shall pay the defendant the costs of the suit. And as to modusses, which are tried on issues, and found against the parson, they shall be established without costs (*k*); the suit in equity is merely for the security of the plaintiff, and to prevent any farther impeachment of his right to an exemption from payment of tithes in specie, and is analogous to the case of a bill brought to perpetuate the testimony of witnesses, in which costs are never given against the defendant; but, in case the modus be established, the defendant shall pay costs to the plaintiff in respect to the proceedings at law (*l*).

The defendant having insisted on a modus in his answer, moved for leave to pay up the arrears of the modus, with costs of the suit up to that time, and the plaintiff to proceed farther at his peril; the application was refused on the ground, that such a tender is never allowed, except where the defendant offers to pay the thing demanded; that is, the value of the tithes them- [286] selves, and not where he tenders a less sum to make good

(*j*) Mason *v.* Watson, Gwill. 611.

(*k*) Anderton *v.* Davies, Gwill. 1268. See also Cleves *v.* Knyston, Ibid. 1048. Berners *v.* Hillet, Ibid. 871.

(*l*) Clifton *v.* Orchard, Gwill. 746. 1 Atk. 510.

the bar he sets up against the demand. The court, however, then said, that they would consider the offer afterwards in the costs, if the plaintiff should proceed. He did proceed; had an issue directed, and abandoned it. The modus was therefore taken *pro confesso*, and the costs to the time of the former offer were directed to be paid by the defendant, since that time by the plaintiff, without opposition (*m*).

V. A summary method of recovering small tithes, under the value of forty shillings, is given by statute 7 and 8 Will. the third, c. 6. by complaint to two justices of the peace: And by another statute of the same year, the same remedy is extended to all tithes withheld by Quakers under the value of ten pounds.

By the former of these statutes, 7 and 8 Will. third, c. 6. (§ 1.) all persons are enjoined to set out and pay their small tithes, and compositions, and agreements for the same, with all offerings to the rectors, vicars, and other persons to whom they are due, according to the rights, customs, and prescriptions commonly used within the respective parishes; and where such tithes, offerings, or compositions, do not amount to above the yearly value of forty shillings from any person; then, if he shall subtract or withdraw, or any way fail in the true payment of them by the space of twenty days, at most, after demand thereof, the person to whom they shall be due may make his complaint in writing to two or more justices of the peace within the county or place where the same shall grow due, neither of whom shall be the patron of the [287] church or chapel whence the tithes arise, nor any

(*m*) Dean and Chapter of Bristol v. Donnesthorpe, Gwill. 1396. 1 Anstr. 272.

way interested in such tithes, offerings, or composition; and it is (§ 2.) further enacted, that the justices on such complaint shall summon by reasonable warning, under their hands and seals, every person against whom any such complaint shall be made; and after his appearance, or default, the summons being proved on oath before the justices, they, or any two or more of them, shall proceed to hear and determine, and shall, upon sufficient proof, in writing, under their hands and seals, adjudge the case, and give such reasonable allowance, and compensation for such tithes, offerings, and composition, as they shall judge to be reasonable, and also such costs and charges not exceeding ten shillings, as upon the merits of the cause shall appear just; (§ 3.) and if any person shall refuse, or neglect, by the space of ten days after notice given, to pay the money adjudged, the constables and church-wardens of the parish, or one of them, shall, by warrant under the hands and seals of the justices, distrain his goods and chattels, and after detaining them by the space of three days, in case the sum adjudged with reasonable charges of the distress, be not tendered, or paid by the party, shall make public sale of the goods distrained, and pay to the party complaining the sum so adjudged, retaining to themselves such reasonable charges of distress as the justices shall think fit, and (§ 4.) rendering the overplus, if any, to the owner; and the (§ 6.) justices are expressly empowered to administer oaths to the witnesses: But no such complaint shall be heard, and determined by the justices, which shall not be made within two years next after the time when the tithes, offerings, and compositions become due; (§ 7.) and an appeal is thereby given to the next general quarter-sessions; and on the judgment being confirmed, the justices are to give reasonable costs against the appellant, to be levied by distress, and no proceedings, or judgment had by virtue

of that act, shall be removed by writ of *certiorari*, unless the *title* to such tithes and offerings shall be in question; (§ 9) and every person obtaining judgment, or against whom judgment shall be obtained by virtue of that act, shall procure it to be inrolled at the next general quarter sessions for the county or place; and the clerk of the peace is required, upon tender thereof, to inrol the same, the fee not to exceed one shilling; and the judgment so inrolled, and satisfaction made by paying the sum adjudged, shall be a good bar against the rectors, vicars, and other persons, from any other remedy for such small tithes, offerings, or compositions, for which such judgment was obtained; (§ 12.) and the justices may give costs not exceeding ten shillings to the party prosecuted, if they shall find the complaint to be false and vexatious, to be levied in the manner before described; (§ 14.) and it is thereby provided, that any clerk, or other person, who shall begin any suit for recovery of small tithes, or offerings, not exceeding the value of forty shillings, in the exchequer, or in any of the ecclesiastical courts, shall have no benefit by that act for the matter, for which he shall have so sued; (§ 5.) and that the act shall not extend to the city of London, nor to any other city, or town corporate, where such tithes or offerings are settled by any act of parliament in that case particularly made; and where any person, against whom such complaint shall be made, shall before the justices insist on any prescription, composition, or modus *decimandi*, agreement, or title, by which he ought to be freed from the payment of such tithes, or other dues in question, and deliver the same in writing to the justices subscribed by him, and shall give to the party complaining security to the satisfaction of the justices, to pay all such costs and damages as upon a trial at law shall be given against him, in case such prescription, composition, or modus *decim*-

mandi, shall not upon such trial be allowed, then that the justices shall forbear to give judgment in the matter, and the complainant may prosecute his complaint in any other court, where he might have sued before the making of that act. (§ 8.)

By the stat. 7 and 8 Wm. third, c. 34. secondly above mentioned, it is enacted, that where any Quaker shall refuse to pay, or compound for his great, or small tithes, or to pay church rates, the two next justices of the peace of the same county, other than such justice as is the patron of the church, or interested in the tithes, may on complaint of any parson, vicar, farmer, or proprietor of tithes, or church-warden, who ought to have, or collect the same, by warrant under their hands and seals, convene such Quaker, and examine by oath, or otherwise, the truth of the complaint, and ascertain the sum due, and by order under their hands and seals direct the payment thereof, provided the sum ordered do not exceed ten pounds; and on refusal of payment any one of such justices may by warrant under his hand and seal levy the money by distress and sale, rendering the surplus, deducting the charges of distraining; and an appeal is thereby given to the next general quarter-sessions from such judgment, with power of giving costs to be levied by distress and sale; and the judgment shall not be removed, or superseded by writ of *certiorari,* or other writ, unless the title shall be in question; provided that in case of such appeal, no warrant of distress shall be granted, till the appeal be determined.

These statutes relate only to tithes, and church rates, and were merely temporary. But by statute 1 Geo. I. stat. 2. c. 6. they are made perpetual, and extended to any tithes, or rates, or any customary, or other rights, dues, or payments belonging to any church, or chapel,

[290] which of right by law and custom ought to be paid for the stipend, or maintenance of any minister, or curate officiating in any church, or chapel; and the act directs, that the proceedings shall not be removed into any other court, unless the title shall be in question.

The writ of *certiorari* having issued to remove an order of justices made against a Quaker, under the above mentioned statute 1 Geo. I. stat. 2. granted on a positive, but general affidavit, that the defendant controverted the title to the tithes before the justices, and that the title to them was really in question, the writ was superseded—*quia improvidè emanavit*, the return taken off the file, and the order remanded, upon its appearing that this allegation and assertion had no other foundation than the general scruples of the defendant to pay demands of this nature; the court holding, that the act was made in favour to, and for the ease and benefit of Quakers, and to save them from troublesome and expensive prosecutions; but that it never meant, that a mere scruple of theirs, or an obstinate withholding of the tithes, should be any hindrance to the matter being determined by the justices of the peace. This would have frustrated the very intention of the act, which meant to give this jurisdiction to justices in that very case, where the legal right, and title to them, should not be in dispute between the parties (*n*).

By the express provision of the above mentioned stat. 44 Geo. III. c. lxxxix. Quakers are exempt from being collectors under that act.

Lastly, in regard to the remedies for the recovery of tithes in London; they are not restricted to such as are afforded by the decree and stat. of Henry VIII.

(*n*) The King *v.* Wakefield, Gwill. 864. Burr. Rep. 485.

It is clearly settled, that the particular jurisdiction created by the decree and statute, has not deprived courts of equity of the ancient jurisdiction, which they exercised on this subject; therefore suits for tithes in Lon- [291] don may still be sustained in the courts of chancery, and the exchequer: This point is established by a long train of authorities, and upon a very sound principle; an act of parliament creating a special jurisdiction never ousts the jurisdiction of Westminster-hall without a special provision to that effect; there is no vestige of an authority to the contrary; and moreover the lord mayor is incapable of exercising a jurisdiction with regard to fraudulent leases. Before the statute of Henry the eighth, tithes in London stood upon the same footing as other matters of ecclesiastical cognizance; but antecedently to that statute courts of equity possessed jurisdiction on the subject, and very beneficially, because the spiritual court in many instances is incapable of applying an effectual remedy; if accounts are necessary, recourse must be had to equity; or in cases of fraud, if the prosecution of the right depend on matters of discovery (*o*).

It farther appears, that the decree and statute just referred to have not deprived the ecclesiastical court of its jurisdiction with respect to tithes in the city of London; for, though in the case of Skidmore and Eire above cited, one point resolved was, that a parson of a parish in London could not sue for the tithes in the ecclesiastical court; for that the act and decree, that raised and gave

(*o*) The warden and minor canons of St. Paul's *v.* Cricket, Gwill. 1485. 2 Ves. jun. 563. and the authorities there cited: see also Burgess *v.* Symons, Lit. Rep. 102, 141, Gwill. 433. Langham *v.* Baker, Hard. 116, Gwill. 511. Umfreville *v.* Batchelor, Gwill. 542.

this kind of tithes, did limit and appoint how, and before whom the same should be sued for, and did appoint new and special judges to hear and determine the same; and in that case it was awarded, that the prohibition should stand (*p*); yet lord Loughborough C. in the course of his argument, in the case of the warden and minor canons [292] of St. Paul's expressed his opinion, that the case of Skidmore and Eire was an unhandsome struggle for jurisdiction, and that the prohibition was carried farther than in just reason it ought. But his lordship at the same time observed, that he could scarcely figure a case, in which the ecclesiastical court would be able to execute its own jurisdiction, for it must run into customary payments (*q*).

By the stat. 44 Geo. III. c. lxxxix. above referred to, it is enacted, that the powers of the stat. 22 and 23 Car. II. c. 15, and also of that stat. shall be vested in the lord Mayor and court of Aldermen, or on their refusal, or neglect to execute such powers, in two of the barons of the court of exchequer; and it is also provided that no court, or judge, ecclesiastical, or temporal, shall hold plea of any monies payable under that act, other than the persons thereby authorised to have cognizance thereof; nor shall it be lawful for any parson, vicar, curate, or incumbent, to convene or sue any person refusing, or neglecting to pay his assessment, in any court, or before any judge, other than what are authorised and appointed by that act for determining the same.

(*p*) Skidmore *v.* Erie, 2 Inst. 660. See also Anon. Gwill. 285, and Sheffield *v.* Pierce, Gwill. 503. Ivatt *v.* Warren, Gwill. 1054.

(*q*) The warden and minor canons of St. Paul's *v.* Cricket, Gwill. 1425. 2 Ves. jun. 563.

The sums of money, which have been duly according to the directions of the act assessed upon the several houses, and other buildings within the parishes mentioned in the act, become it seems fixed and *real* charges upon the houses, and buildings, on which they are so assessed, so that the arrears, which ought to have been paid by the former occupiers, or which became due when the houses stood empty, may be levied by distress and sale of the goods of the present occupiers (*r*).

For the stipends of the ministers of the fifty new churches, provision is made by several acts of parliament, to be raised from the duties on coals.

There are, moreover, several particular statutes relative to particular churches in London, and other places.

(*r*) See *Ex parte* Croxall, Gwill. 812. 3 Atk. 639.

APPENDIX.

No. I.

A CATALOGUE of MONASTERIES of the yearly Value of Two Hundred Pounds, or upwards, dissolved by the Satute of 31 Hen. Eighth, and by such Means capable of being discharged of Tithes. In which are the following Abbreviations: A. Abbey; P. Priory; C. Aust. Canons of St. Austin; Bl. M. Black Monks, Wh. C. White Canons; Ben. Benedictines; Gilb. Gilbertines; Præm. Præmonstratenses; Carth. Carthusians; Mon. Monks; Clun. Cluniacks; Cist. Cistertians; N. Nuns; T. in the Time of; ab. about the Year. The Catalogue is extracted from Tanner's Notitia Monastica.

BEDFORDSHIRE.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Elstow olim Helenestow, Elnstow, or Alnestowe A.	Ben.	T.W.Conqr.	284	12	11¼
Dunstaple P - -	C. Aust.	T.H.I.	344	13	3¼
Wardon A. - -	Cist.	1135	389	16	6¼
Chicksand P. - -	Gilb.	ab. 1150	212	3	5¼
Newenham P. -	C. Aust.	T.H.II.	293	5	11
Woburn A. - -	Cis.	1145	391	18	7¼

BERKS.

Abingdon A - -	Ben.	ab. 670	1876	10	9
Bultesham, or Bysham-Montague A. - -	C. Aust.	13 E.III.	285	11	0¼
Reading A. - -	Ben.	T.H.I.	1938	14	3¼

BUCKS.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Missenden A. . .	C. Aust.	1133	261	14	6¼
Noctele, Nuttley, or De Parco Crendon, or De Parco super Thamam A.	C. Aust.	1162	437	6	8½
Asheridge, or Ashrug Coll. . .	C. Aust.	T. E. I.	416	16	4

CAMBRIDGESHIRE.

Ely P. . .	Ben.	ab. 970	1084	6	9¼
Thorney, olim Ancorig A.	Ben.	972	411	12	11
Barnwell P. . .	C. Aust.	1092	256	11	10¼

CHESHIRE.

St. Werburg's A. . . .	Ben.	1093	1003	5	11
Combermere . .	Cist.	1133	225	9	7
Vale Royal, or De Valle Regalia A. . .	Cist.	ab. 1266	518	19	8

CORNWALL.

Bodmin, olim Bosmanna P.	C. Aust.	ab. 926	270	0	11
St. German's P. . .	C. Aust.	T. Ethelstan	227	4	8
Launceston, olim Lanstaveton, i. e. Fanum S. Stephani P. . .	C. Aust.	ab. 1126	354	0	11¼

CUMBERLAND.

Carliol P. . .	C. Aust.	T. W. Rufus	418	3	4¼
Holm Cultram A. . .	Cist.	1150	477	19	3¼

DERBYSHIRE.

Little Derby, Derlega, or Darley A. . .	C. Aust.	T. H. I.	258	14	5

DEVONSHIRE.

Tavystock, or Tavestock A.	Ben.	981	902	5	7½
Plympton P. . .	C. Aust.	1121	912	12	8¼
Hertland A. . .	C. Aust.	T. H. II.	306	3	2¼
Ford A. . . .	Cist.	1141	373	10	6½
Buckfastre, or Buckfast-Leigh A. . .	Cist.	1137	468	11	2¼

DEVONSHIRE continued.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Tor A.	Præm.	1196	396	0	11
Dunkeswell A.	Cist.	1201	294	18	6
Newenham, or Neuham A.	Cist.	1246	227	7	8
Buckland Monachorum, or Buckland A.	Cist.	1278	241	17	9¼

DORSETSHIRE.

Shireburn A.	Ben.	ab. 870	682	14	7¼
Shaftesbury, *olim Sceptonia* A.	Ben. N.	ab. 888	1166	8	9
Middleton, or Milton A	Ben.	ab. 933	578	13	11¼
Cern, or Cernell A.	Ben.	T. Edgar	515	17	10¼
Tarent, or Tarent Kaines, Kaineston, or Kingston, olim Locus Benedictus Reginæ super Tarent, or Locus Reginæ super Tarent, A.	Cist. N.	1230	214	7	9
Abbotesbury, olim Abbodesbirig A.	Ben.	ab. 1016	390	19	2¼

DURHAM.

Durham P.	Ben.	ab. 842	1366	10	9

ESSEX.

Berking, olim Berechinga, or Bedenham A.	Ben. N.	675	862	12	5¼
Waltham A.	C. Aust.	1062	900	4	3
Colchester A.	Ben.	1096	523	16	0¼
Chich A.	C. Aust.	ab. 1118	677	1	2
Stratford A.	Cist.	1134	511	16	3¼
Walden A.	Ben.	1136	1946	5	9
Coggeshale, or Coxhall A.	Cist.	1142	251	2	0

GLOUCESTERSHIRE.

Gloucester St. Peter's A.	Ben.	ab. 680	1946	5	9
Theokesbury, or Tewkesbury A.	Ben.	715	1598	1	3
Winchelcombe A.	Ben.	798	759	11	9¼
Cirencester A.	C. Aust.	1117	1051	7	1¼

GLOUCESTERSHIRE continued.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Lantony near Gloucester, or Lantonia Secunda	C. Aust.	1136	648	19	11¼
Hayles, or Tray A. .	Cist.	1246	357	7	8½

HAMPSHIRE.

Winchester St. Swithin's P.	Ben.	ab. 646	1517	7	2¼
Hyde, or Newminster A.	Ben.	901	865	18	0¼
Rumesey A. . .	Ben. N.	967	393	10	10½
Wherwell A. . .	Ben. N.	986	339	7	7
Twinham, or Christchurch P.	C. Aust.	ab. 1150	312	7	0¼
Southwyke, or Porchester P.	C. Aust.	1133	257	4	4½
Beaulieu A. . .	Cist.	1204	326	13	2¼
Tychfield A. . .	Præm.	1231	249	16	3

HEREFORDSHIRE.

Wigmore A. . .	C. Aust.	T.H.I.	267	2	10½
Leominster, or Lemster, olim Leonis Monasterium, Leof, or Llanliensis, Cell . .	Ben.	bef. 1125	212	12	0

HERTFORDSHIRE.

St. Alban's A . .	Ben.	793	2102	7	1¼

HUNTINGDONSHIRE.

St. Neot's, olim Eynulfesbury, or Henulvesberi P.	Ben.	T.H.I.	241	11	4¼
Ramsey A. . .	Ben.	969	1715	12	3

KENT.

Canterbury, Christchurch P.	Ben.	ab. 600	2349	8	5¼
Canterbury, St. Augustine's A. . .	Ben.	ab. 605	1413	3	11¼
Leeds P. . . .	C. Aust.	1119	362	7	7
Boxley A. . .	Cist.	1146	204	4	11
Feversham A. .	Ben.	1147	286	12	6¼
Dertford P. . . .	Aust. N.	ab. 1355	380	9	0¼
Rochester P. . .	Ben.	ab. 600	486	11	5
Malling A. . . .	Ben. N.	T.W.Rufus	218	4	2¼

LANCASHIRE.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Furnes A.	Cist.	1124	805	16	5
Whalley A.	Cist.	1172	321	9	1½

LEICESTERSHIRE.

Leicester St. Mary A.	C. Aust.	1143	951	14	5½
Landa, Launde, or Lodington P.	C. Aust.	T.H.I.	399	3	3½
Croxton, or De Valle in Croxton A.	Præm.	1162	385	0	10½

LINCOLNSHIRE.

Bardney, olim Beardanam A.	Ben.	T. Ethelred	366	6	1
Crowland A.	Ben.	716	1083	15	10½
Spalding A.	Ben.	1052	767	7	11
Sempringham P.	Gilb.	ab. 1139	317	4	1
Kirksted A.	Cist.	1139	286	2	7½
Thorneton upon the Humber, or Thornton Curteis, olim Torington A.	C. Aust.	1139	594	17	5½
Revesby A.	Cist.	1142	287	2	4½
Lincoln St. Catherine P.	Gilb.	1148	202	5	0½
Barlings or Oxeney A.	Præm.	1154	252	5	11½
The Priory in the Wood, or the house of the Visitation of the Blessed Virgin, near Eppworth, in the Isle of Axholm.	Carth.	ab. 19 R. II.	237	15	2½

LONDON and MIDDLESEX.

St. John of Jerusalem, or St. Jones	——	1100	2385	19	11
St. Bartholomew's P.	C. Aust.	1123	693	0	10½
Clerkenwell, or St. Mary's de Fonte Clericorum P.	Ben. N.	ab. 1100	262	19	0
Haliwell P.	Ben. N.	before 1127	300	19	5
St. Helen's P.	Ben. N.	ab. 1210	320	15	8½
Chartreuse House P.	——	ab. 1360	642	0	4½
The Minories	——	1293	318	8	5
Eastminster New Abbey, or St. Mary of Graces.	Cist.	1349-50	547	0	6½

LONDON and MIDDLESEX continued.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Westminster, olim Thorneie A.	Ben.	ab. 610	3476	0	2¼
Syon A.	Brig. N.	1414	1731	8	9¼

NORFOLK.

St. Bennet's of Hulme A.	Ben.	ab. 1800	583	17	0¼
Walsingham P.	C. Aust.	T.W.Conq.	391	11	7¼
Thetford P.	Clun.	ab. 1104	312	4	4
Castleacre or Eastacre P.	Clun.	ab. 1085	306	11	4¼
Norwich P.	Ben.	1100	874	14	6¼
Westacre, olim Acra P.	C. Aust.	T.W.Rufus	260	13	7¼
Wymondham, or Windham A.	Ben.	before 1107	211	16	6¼
West Dereham A.	Præm.	1188	228	0	0¼

NORTHAMPTONSHIRE.

Peterborough, olim Medeshamsted A.	Ben.	ab. 655	1721	14	0¼
Northampton St. Andrew's	Clun.	1076	263	7	1¼
Pipewell, olim S. Mariæ de Davisis	Cist.	1143	286	11	8¼
Sulby, or Welleford A.	Præm.	1155	285	8	5

NORTHUMBERLAND.

Tinmouth, olim Dunemuth, or Dounemade Cell.	Ben.	T.St.Oswald	397	10	5¼

NOTTINGHAMSHIRE.

Wirkesop, or Radford P.	C. Aust.	T.H.I.	239	15	5¼
Lenton P.	Clun.	T.H.I.	387	10	10½
Thurgarton P.	C. Aust.	ab. 1130	359	9	4½
Welbeck A.	Præm.	1152	249	6	3

OXFORDSHIRE.

Egnesham, or Eynsham A.	Ben.	before 1005	441	12	2¼
Tame A.	Cist.	ab. 1137	256	14	7½
Godestow A.	Ben. N.	1138	258	10	6½

OXFORDSHIRE continued.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Oseney A. . .	C. Aust.	1129	654	10	2¼
Dorchester, olim Dorcia A.	C. Aust.	1140	217	5	9½

SHROPSHIRE.

Wenlock, olim Wimnicas A.	Clun.	14W.Conq.	401	7	0¾
Shrewsbury A. . .	Ben.	1083	532	4	10
Haghmon A. . .	C. Aust.	1110	259	13	7¼
Lilleshall, near Duninton A.	C. Aust.	ab. 1145	229	3	1¼
Hales, or Halesoweyne A.	Præm.	T. John	280	13	2½

SOMERSETSHIRE.

Glastonbury, olim Avallonia A. .	Ben.	——	3311	7	4¼
Bath A. . . .	Ben.	ab. 775	617	2	3
Athelney, olim Ethelingraia A. .	Ben.	ab. 888	209	0	3¼
Michelney, or Muchenay A.	Ben.	939	447	4	11
Bruton, Brewetone, or Briwedon A. .	C. Aust.	ab. 1005	439	6	8
Montacute P. . .	Clun	T.W.Co. or H. I.	456	12	3¼
Taunton P. . .	C. Aust.	T.H.I.	286	8	10
Keynsham A. . .	C. Aust.	ab. 1170	419	10	4¼
Minchin Buckland P. .	Aust. N.	T.H.II.	223	7	4¼
Witham P. . .	Carth.	T.H.II.	215	15	0
Henton P. Atrium Dei, or Locus Dei . . .	Carth.	1227	248	19	2

BRISTOL.

Great St. Augustine's P.	C. Aust.	1148	670	13	11¼

STAFFORDSHIRE.

Burton A. . .	Ben.	1004	267	14	3
Dieulacres A. . .	Cist.	1214	227	5	0

SUFFOLK.

Bury St. Edmund, olim Bederiesworthe, or Eadmundestow A. .	Ben.	1020	1656	7	3
Sibton A. , .	Cist.	1149	250	15	7¼
Butley P. . .	C. Aust.	1171	318	17	2¾

SURREY.

Monasteries.	Order.	Founded.	Value. £.	s.	d.
Chertsey, olim Cirotesege, or Ceorteséi A.	Ben.	666	659	15	8¼
Bermondsey A.	Clun.	1082	474	14	4¾
St. Mary Overy P.	C. Aust.	1106	624	6	6
Merton P.	C. Aust.	1117	957	19	5½
Aldebury P.	C. Aust.	T.R.I.	258	11	11½
Shene P.	Carthus.	1414	777	12	0½

SUSSEX.

Battell, or De Bello A.	Ben.	1067	880	14	7¾
Lewes P.	Clun.	1078	920	4	6¼
Robert's Bridge, or De-Ponte Roberti A.	Cist.	1176	248	10	6

WARWICKSHIRE.

Coventry P.	Ben.	ab. 1043	538	4	0
Kenilworth, olim Cheningenurda A.	C. Aust.	ab. 1122	538	19	4
Mereval, or De Miravalle, near Atherston A.	Cist.	ab. 1148	254	1	8
Combe, olim, Smite, near Brinklow A.	Cist.	1150	311	10	1
Nun Eaton P.	Fonterv. N.	T.H.II.	253	14	2½

WILTSHIRE.

Ambrosebury, or Amesbury, olim Ambrosia, sive Ambrii Cœnobium A.	Ben. N.	ab. 980	495	15	2
Malmesbury, olim Caer Bladon, Ingelborn, Maidulphi urbs, sive Curia, Aldhelmesbirigh, Maldmesburgh, Meldunum, or Meldunesburgh A.	Ben.	ab. 670	803	17	7¼
Wilton, olim Ellandune A.	Ben. N.	T. Egbert	601	1	1½
Kingswood A.	Cist.	1139	244	11	2
Bradenstoke P.	C. Aust.	1142	212	19	3
Edindon, or Hedington P.	Bonhommes	1358	442	9	7¼

WORCESTERSHIRE.

Monasteries.	Order.	Founded.	Value. £.	s	d.
Worcester P. . .	Ben.	T. Edgar	1229	12	8¼
Pershore, olim Perscora A.	Ben.	984	643	4	5
Eovesham, or Evesham A.	Ben.	701	1183	12	9
Malvern Major P. .	Ben.	ab. 1083	308	1	4¼
Bordesly A. . .	Cist.	1138	388	9	10¼

YORKSHIRE.

Whitby, olim Streaneschach, Sinus Phari, Presteby A. . .	Ben.	T.W.Conq.	437	2	9
Selby, olim Salebeia A.	Ben.	T.W.Conq.	729	12	10¼
Warton, olim Vetadun P.	Gilb.	ab. 1150	360	18	10¼
York St. Mary A. .	Ben.	1088	1650	7	0¼
Pontfract, olim Kyrkeby, or Brokenbrigge P.	Clun.	T.W.Rufus	327	14	8¼
Nostell, Nostlai, or Nestelhoo P. . .	Clun.	T.W.Rufus	492	18	2
Bolton in Craven P.	C. Aust.	1120	212	3	4
Kirkham P. . .	C. Aust.	1121	269	5	9
Burlington, or Bridlington, olim Brellinton, or Berlintona P. .	C. Aust.	T.H.I.	547	16	11½
Giseburn or Gysburgh P.	C. Aust.	1129	628	3	4
River, olim Rievall, or Rivaulx A. . .	Cist.	1131	278	10	2
Fountains, or De Fontibus A. . .	Cist.	1123	998	6	8½
Byland, olim De Bellalanda, Begelanda, sive Bechland A. . .	Cist.	1143	238	9	4
Newburgh or De Novo Burgo P. . .	C. Aust.	1145	367	13	3
Roch, or De Rupe A.	Cist.	1147	224	2	5
Kirkstall A. . .	Cist.	1147	329	2	11
Melsa, or Meaux A. .	Cist.	1150	299	6	4¼
Joreval, Jervaux, or Gervis A. . .	Cist.	1156	234	18	5
Monk Breton, or Lunda P.	Clun.	T.H.II.	239	3	6
Mountgrace P. . .	Carthus.	1396	323	2	10¼

No. II.

Tithes of the Parishes burnt by the Fire, as fixed by Stat. 22 & 23 Car. II. c. 15.	As increased by the Stat. 44 Geo. III. c. lxxxix. £.	s.	d.
1. Of the parish of *Alhallows Lombard-street*, one hundred and ten pounds, cx *l.*	200	0	0
2. Of St. *Bartholomew Exchange*, one hundred pounds, c *l.*	200	0	0
3. Of St. *Bridget*, alias *Brides*, one hundred and twenty pounds, cxx *l.*	200	0	0
4. Of St. *Bennet Finck*, one hundred pounds, c *l.*	200	0	0
5. Of St. *Michael Crooked lane*, one hundred pounds, c *l.*	200	0	0
6. Of St. *Christopher*, one hundred and twenty pounds, cxx *l.*			
7. Of St. *Dionis Backchurch*, one hundred and twenty pounds, cxx *l.*	200	0	0
8. Of St. *Dunstan* in the east, two hundred pounds, cc *l.*	333	6	8
9. Of St. *James Garlick Hithe*, one hundred pounds, c *l.*	200	0	0
10. Of St. *Michael Cornhill*, one hundred and forty pounds, cxl *l.*	233	6	8
11. Of St. *Michael Bassishaw*, one hundred thirty and two pounds eleven shillings, cxxxii *l.* xi *s.*	220	18	4
12. Of St. *Margaret Lothbury*, one hundred pounds, c *l.*			
13. Of St. *Mary Aldermanbury*, one hundred and fifty pounds, cl *l.*	250	0	0
14. Of St. *Martin Ludgate*, one hundred and sixty pounds, clx *l.*	266	13	4
15. Of St. *Peter*, *Cornhill*, one hundred and ten pounds, cx *l.*	200	0	0
16. Of St. *Stephen Coleman-street*, one hundred and ten pounds, cx *l.*	200	0	0
17. Of St. *Sepulchre*, two hundred pounds, cc *l.*	333	6	8
18. Of *Alhallows Bread-street*, and St. *John Evangelist*, one hundred and forty pounds, cxl *l.*	233	6	8
19. Of *Alhallows the Great*, and *Alhallows the Less*, two hundred pounds, cc *l.*	333	6	8
20. Of St. *Alban Wood-street*, and St. *Olaves Silver-street*, one hundred and seventy pounds, clxx *l.*	283	6	8
21. Of St. *Anne* and *Agnes*, and *John Zachary*, one hundred and forty pounds, cxl *l.*	233	6	8

Tithes of the Parishes burnt by the Fire, as fixed by Stat. 22 & 23. Car. II. c. 15.	As increased by the Stat. 44 Geo. III. c. lxxxix. £.	s.	d.
22. Of St. *Augustine*, and St. *Faith*, one hundred and seventy two pounds, clxxii *l.*	266	13	4
23. Of St. *Andrew Wardrobe*, and St. *Anne Black-fryers*, one hundred and forty pounds, cxl *l.*	233	6	8
24. Of St. *Antholin*, and St. *John Baptist*, one hundred and twenty pounds, cxx *l.*	200	0	0
25. Of St. *Bennet Gracechurch*, and St. *Leonard Eastcheap*, one hundred and forty pounds, cxl *l.*	233	6	8
26. Of St. *Bennet Paul's-wharf*, and St. *Peter's Paul's-wharf*, one hundred pounds, c *l.*	200	0	0
27. Of *Christ Church*, and St. *Leonard Foster-lane*, two hundred pounds, cc. *l.*	333	6	8
28. Of St. *Edmond the King*, and St. *Nicholas Acons*, one hundred and eighty pounds, clxxx *l.*	300	0	0
29. Of St. *George Botolph-lane*, and St. *Botolph Billingsgate*, one hundred and eighty pounds, clxxx *l.*	300	0	0
30. Of St. *Lawrence Jury*, and St. *Magdalen Milk-street*, one hundred and twenty pounds, cxx *l.*	200	0	0
31. Of St. *Margaret Lothbury*, and St. *Christopher*,	366	13	4
32. Of St. *Magnus* and St. *Margaret New Fish-street*, one hundred and seventy pounds, clxx *l.*	283	6	8
33. Of St. *Michael Royal*, and St. *Martin Vintry*, one hundred and forty pounds, cxl *l.*	233	6	8
34. Of St. *Matthew Friday-street*, and St. *Peter Cheap*, one hundred and fifty pounds, cl *l.*	250	0	0
35. Of St. *Margaret Patons*, and St. *Gabriel Fenchurch*, one hundred and twenty pounds, cxx *l.*	200	0	0
36. Of St. *Mary at Hill*, and St. *Andrew Hubbard*, two hundred pounds, cc *l.*	333	6	8
37. Of St. *Mary Woolnoth*, and St. *Mary Woolchurch*, one hundred and sixty pounds, clx *l.*	266	13	4
38. Of St. *Clement Eastcheap*, and St. *Martin Orgars*, one hundred and forty pounds, cxl *l.*	233	6	8
39. Of St. *Mary Abchurch*, and St. *Lawrence Pountney*, one hundred and twenty pounds, cxx *l.*	200	0	0
40. Of St. *Mary Aldermary*, and St. *Thomas Apostle*, one hundred and fifty pounds, cl *l.*	250	0	0
41. Of St. *Mary le Bow*, St. *Pancras Soper-lane*, and *Alhallows*, *Honey-lane*, two hundred pounds, cc *l.*	333	6	8

Tithes of the Parishes burnt by the Fire, as fixed by Stat. 22 & 23 Car. II. c. 15.	As increased by the Stat. 44 Geo. III. c. lxxxix.		
	£.	s.	d.
42. Of St. *Mildred Poultry*, and St. *Mary Cole Church*, one hundred and seventy pounds, clxx *l.*	283	6	8
43. Of St. *Michael Wood-street*, and St. *Mary Staining*, one hundred pounds, c *l.*	200	0	0
44. Of St. *Mildred Bread-street*, and St. *Margaret, Moses*, one hundred and thirty pounds, cxxx *l.*	216	13	4
45. Of St. *Michael Queenhyth*, and *Trinity*, one hundred and sixty pounds, clx *l.*	266	13	4
46. Of St. *Magdalen Old Fish-street*, and St. *Gregory*, one hundred and twenty pounds, cxx *l.*	200	0	0
47. Of St. *Mary Somerset*, and St. *Mary Mounthaw*, one hundred and ten pounds, cx l.	200	0	0
48. Of St. *Nicholas Cole Abbey*, and St. *Nicholas Olaves*, one hundred and thirty pounds, cxxx *l.*	216	13	4
49. Of St. *Olave Jewry*, and St. *Martin Ironmonger-lane*, one hundred and twenty pounds, cxx *l.*	200	0	0
50. Of St. *Stephen Walbrook*, and St. *Bennet Sheerhogg*, one hundred pounds, c *l.*	200	0	0
51. Of St. *Swithin*, and St. *Mary Bothaw*, one hundred and forty pounds, cxl *l.*	233	6	8
52. Of St. *Vedast*, alias *Fosters*, and St. *Michael Queen*, one hundred and sixty pounds, clx *l.*	266	13	4

Names of Cases.

A.

ABBOT *v.* Hicks, 112
Adams *v.* Waller, 107. 120. 227
Alden *v.* Tothill, 52
Allott *v.* Wilkinson, 277
Anderton *v.* Davis, 191. 285
Andrews *v.* Lane, 74
——— *v.* Lane, 60. 63. 184
Anonymous, 23. 50. 58. 75. 82. 90. 103. 105, 106. 108. 110. 118. 120. 153. 156. 161. 249. 252. 262, 263, 264, 265. 291.
Ansell *v.* Adnam, 44
Antrobus *v.* East India Company, 245
Arnold *v.* Bidgood, 24. 260
Arundell's, Lord, Case, 148. 271
Ashby *v.* Power, 203. 273
Atkins *v.* Hattan, Bart. 275
——— *v.* Lord Willoughby de Broke, 192, 193. 205. 228
Atkinson *v.* Folkes, 40
Attorney General and Blair *v.* Cholmley, 223
——————— *v.* Bowles, 220, 221
——————— *v.* Brereton, 58
Austen *v.* Nicholas, 60
——— *v.* Pigot, 184. 194. 257
Austyn *v.* Lucas, 84. 110. 128
Audry *v.* Smallcombe, 55
Ayd *v.* Flower, 64

B.

Bagster *v.* Knollys, 266
Bailey *v.* Warrall, 265
Baker *v.* Athill, 193. 264
—— *v.* Planner, 195
—— *v.* Strutt, 275. 280
—— *v.* Sweet, 88. 137
Banister *v.* Wright, 13
Barfoot *v.* Norton, 125
Barnes *v.* Hutton, 198. 257
Barsdale *v.* Smith, 55.
Barton *v.* Hollis, 53. 170
Baskerville *v.* Clarke, 55
Bate *v.* Hodges, 207
—— *v.* Sprakling, 109. 132
Bateman *v.* Aistreppe, 87. 208
Baxter *v.* Hopes, 106
Bead *v.* Adams, 74
Beadle *v.* Sherman, 258. 260
Beal *v.* Web, 194, 257
Bean *v.* Lee, 185
Beardmore *v.* Gilbert, 160
Beaumont *v.* Shelcot, 60. 118
Beaver *v.* Spratley, 67
Bedford *v.* Sambell, 140, 141. 203
——— *v.* Skinner, 109
Bedingfield *v.* Feak, 60
Bedle *v.* Miller, 132
Bell *v.* Read, 266
Bennet *v.* Read, 49. 53. 148. 150. 190
——— *v.* Trepass, 229, 230. 240.

Benning *v.* Douce, 170.
Benson *v.* Olive, 171. 278
——— *v.* Watkins, 62. 64. 118. 207. 222
Benton *v.* Trot, 174. 178. 182
Berkley *v.* Fox, 15
Berners *v.* Hillet, 285
Berney *v.* Chambers, 264
Berwick *v.* Swanton, 264
Bibye *v.* Huxley, 105
Biggs *v.* Martin and Letts, 102. 106
Birch *v.* Stone, 188
Bishop *v.* Arundell, 184
—— *v.* Chichester, 190. 203. 207, 208. 215
Blacket, Sir Edward, *v.* Dr. Finney, 251
Blackwell's Case, 252
Blincoe *v.* Barksdale, 58
Bliss *v.* Chandler, 115
Bonsey *v.* Lee, 58
Bordley *v.* Tims, 86
Boscawen *v.* Roberts, 185. 209
Bosworth *v.* Lembrick, Cullimore, and Stock, 77. 92. 119. 132, 133
Botolph, St. (Parson of) Case, 169
Boughton *v.* Hustler, 98.
——— *v.* Wright, 70
Bouher *v.* Morgan, 267
Boys *v.* Ellis, 139
Brabourne, *v.* Eyres, 113
Bradshaw *v.* Clifton, 177
Bramston *v.* Heron, 239. 246
Branche's Case, 182
Breary *v.* Manby, 164, 165
Bree *v.* Chaplin, 205. 273
—— *v.* Drew, 112, 113
Brewer *v.* Hill, 27. 34. 225
Brinklow *v.* Edmonds, 134. 142. 144. 146. 199. 201. 210
Bristol, Dean and Chapter of, *v.* Clerke, 17. 19. 258. 286
——— *v.* Donnesthorpe, 286
Broadley *v.* Brocklebank, 55
Brock *v.* Richardson, 227, 257. 266. 269
Brook *v.* Rogers, 103
Brown's Case, 219
Brown *v.* Barlow, 226
——— *v.* Thetford, 262
Buck *v.* Witt, 161
Buckhurst *v.* Newnton, 101
Burslem *v.* Burbage, 264
——— *v.* Spencer, 92. 110, 128
Burwell *v.* Coates, 188
Bury St. Edmund's Corporation, and Wright *v.* Evans, 164
Butter *v.* Heathby, 67
Button *v.* Honey, 263
Buxton *v.* Hutchinson, 152
Byne, *v.* Doddridge, 185
Byron *v.* Lamb, 159. 162

C.

Cage *v.* Warner and another, 262
Calley *v.* Williamson. 283
Calmell *v.* Sherratt and Muchell, 265
Camell *v.* Ward, 146, 147
Canning *v.* Jones, 40
Carleton *v.* Brightwell, 45. 146. 187. 201. 266
Carman's Case, 65
Carr *v.* Chamberlayne, Heaton and Chapman, 56. 279
Carte *v.* Ball and others, 57
Carthew *v.* Edwards, 48. 129. 131. 137
Cartwright *v.* Bailey, 50
——— *v.* Cotton, 223
Chamberlayne *v.* Newte, 45
——— *v.* Spencer, 205
Chambers *v.* Hanbury, 219
Chapman *v.* Barlow, 120. 156
——— *v.* Beard, 267, 268
——— *v.* Bishop of Lincoln, and Mownson, 183. 211
——— *v.* Keep, 54

Chapman v. Smith, 148. 150. 201. 203, 204. 209
Charlton, Lady, v. Sir Blunden Charlton, 16. 167
Charry v. Garland, 270
Chase v. Ware, 67
Chave v. Calmel, 225. 256
Chaytor v. Trinity College and Wood, 264
Cheeseman v. Hoby, 250. 252
Christian v. Wrenn, 140
Clanrickard, Earl of, v. Lady Denton, 149. 181. 257. 282
Clarke v. Jennings, 193
——— v. Stapler, 50
Clavill v. Orem, 175, 176
Cleves v. Knyston, 266. 285
Clifton v. Orchard, 285
Coe v. Mason, 52
—— v. Smith, 85. 112. 114
Coggan v. Lord Lonsdale, 194
Coke's, Sir Edward, case, 17. 22
Colchester v. Russell, 208. 210
Cole v. Wilks, 261
Coleman v. Barker, 88. 94
Collard v. Newton, 264
Collins v. Gough, 266
——— v. Vaughan, 40
Collyer v. Howes, 75, 76. 82.
Coltford v. Pease, 211
Compost v. ——, 168
Conant v. Greaves, Bart. 189
Congley v. Hall, 255
Cornwallis v. Spurling, 175
Cotes and Suckerman v. Warner, 177. 257
Coventry, Earl, v. Burslem, 264
Cowley v. Keys
Cowper v. Andrews, 216
Crabb v. Hayne, 80
Crawley v. Watts, 81
Crayhorne v. Taylor, 18
Croft v. Ayer and Bailey, 195
—— v. Blake, 141
—— v. Case, 141
Crouch v. Fryer, 170
——— v. Risden, 114, 115
Croucher v. Collins, 110
Croxall ex parte, 292
Cuthbert v. Westwood, 223

D.

Daniel v. Tuffnall, 86
Darby v. Cosens, 257
Daws v. Mollins, 102
Day v. Peckwell, 259. 261
Devie v. Lord Brownlow, 53. 55. 57. 273
Dickenson v. Greenhill, 172. 177
——— v. Reade, 34. 178
Dobitoft v. Curteen, 178
Doble v. Potman, 262
Dodd v. Ingleton, 130. 132
Dodson v. Oliver, 45. 129, 130, 131
Doyley v. Hornby, 161
Drake v. Brooking, 284
——— v. Taylor, 249
Dummer v. Wingfield, 88
Dunn v. Burrell and Goffe, 229. 236
Durrant v. Booty, 63

E.

East v. Harding, 109
Eaton v. Sherwin, 32
Edgerton v. Follett, 125. 201
——— v. Still, 48. 143
Edmunds v. Booth, 32
Ekin v. Pigott, 208. 212
Ekins v. Dormer, 55. 221. 266
Ellis v. Drake, 65. 110
—— v. Firmor, 84. 88, 89. 112
—— v. Saul, 42. 53. 84. 194. 211
Erskine v. Ruffle and Brewster, 72, 73. 75. 133, 134. 150. 282
Etherington v. Hunt, 182

Evans v. Green, 283
—— v. Neville, 13
Exeter, Bishop of, v. Trenchard and others, 284

F.

Facey v. Lange, 85
Fanshaw v. More, 165. 168
———— v. Rotheram, 164. 166. 182
Farmer v. Sherеman, 179
Fenwicke v. Lamb, 188
Ferrars v. Pellatt, 51
Filewood v. Button, 95
Finch v. Masters, 211
Fish v. Wimberley, 60
Fisher v. Leaman, 85
Flemyng and the Tenants of Dudley, 185. 189
Fletcher v. Wilkinson, 140. 198. 257
Flower v. Vaughan, 50
Foss v. Parker, 136
Fossett v. Franklin, 175
Foster v. Peacock, 105
Fox v. Ayde, 63. 79. 200
—— v. Bardwell, 177
—— v. Rutty, 56
Foxcroft v. Paris, 197
Franklyn and others v. The Master and Brethren of St. Cross, 55. 64. 208
———— v. Gooch, 69
———— v. Holmes, 222
———— v. Spilling, 277
Fryer v. Sims, 281. 283
Fynes v. Ordoyno, 56, 57. 271

G.

Gaches v. Haynes, 48
Gale v. Carpenter, 207
—— v. Ewer, 67. 71. 252
Garnons v. Barnard, 15. 57. 267
Garrard v. Schollar, 266
Gee v. Pearch, 109. 113, 114. 160
Gerard's case, 261
Gibb v. Goodman, 143, 144. 190. 210
Gibbs v. Wybourne, 65. 107
Gibson v. Holcraft, 176
Gilbert v. Gurney, 46
Gills v. Horrex, 192
Glass v. Caldwell, 227
Goddard v. Keble, 190. 208
Goodale v. Butler, 40
Goodall v. Perkins, 105. 110
Goodwin v. Wortley, 190. 217
Goole v. Jordan, 272
Gordon v. Simpkinson, 265
Grant v. Brown and another, 247
—— v. Cannon, 247
——'s, Dr. case, 151. 246
—— v. Hedding and Ball, 65. 107
—— v. Hunt, 74
Green v. Balser, 175. 182
—— v. Hun, 74. 95. 135. 199. 211
—— v. Penilden, 256
—— v. Piper, 234
Greenwood's case, 260
Gregory v. Luttrell, 148
Grendon v. Lincoln, Bishop of, 38. 51. 54
Grene v. Austen, 53. 64
Griffiths v. Williams, 263
Grymes and others v. Smith, 52
Grysman v. Lewis, 85. 201
Guftley v. Pindar, 105
Guilbert v. Eversley, 96
Gumbley v. Burt, 60
———— v. Fontleroy, 195
Gwavas v. Kelinock, 49
Gwyn v. Merryweather, 68

H.

Hall v. Fettyplace, 199

Hall *v.* Filtz, 62. 86
—— *v.* Machet, 45, 46
Halsey *v.* Halsey, 252
Hanking *v.* Gay, 174
Hankins *v.* Joyce, 98
Hansom *v.* Fielding, 175
Hardcastle *v.* Sclater, 212, 213
Harrington *v.* Horton, 79. 194. 212
Harris *v.* Adge, 268
Harrison *v.* Sharp, 97
Hatfield *v.* Rawling, 88
Hawes *v.* Cornwall, 102
Hawkins *v.* Harkness, 283
Hayes *v.* Dowse, 83
Haywood *v.* Nicholls, 203. 222. 281
Heale *v.* Spratt, 71
Heathcote *v.* Mainwaring, 222
Heaton *v.* Regal, 141
Hele *v.* Bragg, 95
—— *v.* Pronte, 262
Henning *v.* Willis, 32. 284
Hertford, Earl of, *v.* Leech, 13. 168, 169
Hett *v.* Meads, 180
Hicks *v.* Froud, 214. 249
—— *v.* Triese, 47
—— *v.* Woodeson, 85. 98. 168. 170, 171
Hide *v.* Ellis, 79
Higham *v.* Best, 57
Hill *v.* Vaux, 128. 147
Hilton *v.* Heath, 227
Hodgson *v.* Smith, 60
Holland *v.* Heale, 48
Hotham *v.* Foster, 169
Howes *v.* Carter, 87
Hughes *v.* Billinghurst, 46
Hugton *v.* Prince, 145, 146
Hull *v.* Mathews, 284
Hulse *v.* Munk, 207
Hume *v.* Wright, 123
Humphreys *v.* Stopher, 86
Hungerford *v.* Hewland, 17
Hunsfow *v.* Cocket, 52
Hunt *v.* Codrington and others, 60
Hutchins *v.* Full, 130. 135
—— *v.* Maugham, 159
Hutton *v.* Barnes, 257.

I.

Jackson *v.* Walker and others, 54. 114. 273
Jennings *v.* Lettis, 165. 168
Jeremy *v.* Strangeways, 50. 59
Jesop *v.* Payne, 136
Illingworth *v.* Leigh, 149. 273, 274. 279
Ingleby *v.* Wyvell, 225
Ingram *v.* Thackston, 177
Johns *v.* Carne, 260
Johnson *v.* Awbrey, 63
—— *v.* Bois, 99. 170
—— *v.* Dandridge, 47
—— *v.* Firebrace, 98
Jones *v.* Barrett, 264
—— *v.* Le David, 158. 161, 162
—— *v.* Snow, 223
—— *v.* Waller, 272
Jordan *v.* Colley and others, 98. 171
Ivatt *v.* Warren, 236. 246. 291

K.

Keddington *v.* Adamson, 32. 225
Kellington, Vicar of, *v.* Trinity College, 272
Kennedy *v.* Goodwin, 207
Kent *v.* Penkevon, 259.
Kenyon *v.* West, 144
Kershaw *v.* Isles, 85
Kinaston *v.* East India Company, 245
Kipping *v.* Swayn, 68. 261
Kirshaw, *vide* Kershaw

Knight v. Halsey, 59. 72. 79. 81. 98. 106. 113. 115
Kynaston v. Clarke, 269
——— v. Hattersley, 151. 272
——— v. Miller, 247
——— v. Willoughby, 236. 247

L.

Laithes v. Christian, 194
Lake v. Bruton, 79
Lamb v. Tatersall, 72
Lambert v. Cummin, 89. 174
Lamprey v. Rooke, 176, 177
Langham v. Baker and others, 291
——— v. Sparstowe and others, 264
Lapthorne v. Bridgman, 105
Law v. Ibbetson, 40
Lawrence v. Jones, 48
Layfield v. Enticknapp, 209
Legross v. Levemoor, 148. 271
Leigh v. Maudsley, 264
——— v. Wood, 252
Lewes v. Gifford, 139
Leyfield v. Tysdale, 150
Lincoln, Bishop of, v. Cooper, 169. 176
——— v. Sir William Ellis and others, 279
Linge v. Gunter, 257
Lister v. Foy, 120. 128. 136. 141
Lloyd v. Bentley, 82
——— v. Mackworth, 105
——— v. Mortimer and Kirkman, 53. 226. 275
——— v. Small, 184. 203
Lockin v. Davenport, 65
London, Bishop of, and Beaumont v. Nicholls, 264
Loveday v. Mooser, 203
Lowther v. Bolton, 18. 263

M.

Macgill v. Le Strange, 38
Mallock v. Browse, 194
Mantell v. Pain, 74. 77. 82. 86. 109. 111. 144
Margetts v. Butcher, 63
Markham v. Huxley, 194. 210
——— v. Laycock, 186
Marston v. Claypole, 266
Mason v. Hine, 189
——— v. Holton, 199
——— v. Watson, 235
Mawbey v. Edmead, 265
Mayne v. Becke, 262
Mead v. Thurmama, 83
Meadhouse v. Taylor, 234
Medly v. Talmy, 164
Mickleburgh v. Crisp, 91
Miller v. Foster, 276
Mills v. Etheridge, 40
Mitchell v. Walker, 269
Mouncaster v. Watson, 219
Monoux v. Shish, 266
Moore v. Beckford, 204
——— v. Bullock, 81
Morden v. Knight, 105
Mere v. Russell, 44
Moreton's case, 260
Morgan v. Neville, 129. 273
Morison's, Sir Charles, case, 201
Morton v. Briggs, 144. 201
Mountford v. Sidley, 71
Moyle v. Ewer, 68. 261

N.

Nagle v. Edwards, 99. 165. 171
Nanton v. Clarke, 153
Nash v. Molins, 175
——— v. Thorn, 165. 195
Nicholas v. Elliott, 49. 153
Nicholl's case, 74
Nixon v. Browne, 112

Norton v. Clarke, 41. 50, 51. 60, 61
——— v. Fermer, 110, 111
Norwich, Bishop of, and Eachard, v. Buckles, 264
Notley v. Cosens, 257
Nowell v. Hicks, 189, 219.

O.

O'Connor v. Cook, 203. 205, 206. 222
Offley v. Fanshaw, 264, 265
Oglander v. Lord Pomfret, 55
Oliver v. Bakewell, 267
Ord v. Clarke, 183. 213
Owen v. The Parishioners of All Saints, 256
Oxenden, Bart. v. Skinner, 22. 165

P.

Page's case, 264
Parker v. Turner, 284
Parry v. Hervey and others, 13
Payne v. Pawlett, 54
Peck v. Dixon, 153
Pelles v. Saunderson, 168
Pemberton v. Beckwith, 66
Penrice v. Dugard, 190
Perkins v. Hinde, 23
Perrot v. Marwick, 124
Petre, Lord, v. Blencoe, 281
Petit v. Charley, 15
Peykirke's, Parson, case, 175
Phillips v. Kettle, 18. 269
——— v. Prythorick, 214. 265
——— v. Symes, 188. 210
Pigot v. Heron, 17. 168. 211
Pocock v. Titmarsh, 151
Pole v. Gardiner, 206. 210
Poor v. Seymour, 88
Porter v. Bathurst, 178
Portinger v. Johnson, 80. 198. 257
Pothill v. May, 96
Potts v. Durant, 275, 276
Pratt v. Hopkins, 182
Price v. Elvey, 227
—— v. Pratt, 59
Priddle, Napier v. 38. 176
Pringe v. Child, 53
Prowse v. Dr. Leyfield, 176
Pye v. Rea, 273
Pyke v. Brock, 266
—— v. Dowling, 203. 266

Q.

Quilter v. Massendire, 40

R.

Radford v. Mackintosh, 267
Ram v. Patenson, 102
Rawlins and others v. Wright, 13
Reignolds v. Vincent, 141
Reynell v. Rogers, 227
Reynolds v. Green, 15. 55
Rex v. Owen, 253
—— v. Wakefield, 290
Richards v. Evans, 190, 191
Riddle v. White, 182
Risden v. Crouch, 53. 59
Robert's case, 257
Robinson v. Appleton, 222
——— v. Barroby, 265
——— v. Bedel, 53
——— v. Brooke, 60. 226
——— v. Tunstall, 95
Roffe v. Harding, 84. 110. 112
Rose v. Calland, 166
Rotherham v. Fanshaw, 251
Rumney v. Willis, 284
Russell v. Partridge, 99. 171

S.

St. Paul's, Warden and Minor Canons of, v. Crickett, 236. 291, 292

St. Paul's, Warden and Minor Canons of, v. Morris, 241
Salmon v. Rake, 251
Sanders v. Ryall, 57
Sandford, Saunders v. 17. 259
Sands v. Drury, 21
—— v. Eastmond, 94
Sansom v. Shaw, 211, 212
Savell v. Wood, 198
Sawbridge v. Benton, 220
Sawrey v. Collins, 57
Sayer v. Mumford, 236
Scarborough, Earl of, v. Hunter and others, 48
Scare v. Trinity College and Wood, 41, 42
Scolee v. Lowther, 92. 131. 133
Scory v. Baber, 197
Scott v. Airey, 22. 164. 166. 182
—— v. Allgood, 190. 274
—— v. Fenwick, 149. 215. 266
—— v. Wall, 251
Serjeants, the case, 175
Shapcott v. Magford, 72
Sheffield v. Pierce and others, 236. 291
——— v. Serjeant, 35. 264
Sheppard v. Penrose, 48. 198
Sherington v. Fleetwood, 160, 161. 174. 201
Sherwood v. Winchcombe, 18
Sibley v. Crawley, 257
Simms v. Bennett, 11. 50. 60
Skidmore v. Bell, 235. 291
Skinner v. Smith, 153
Slade v. Drake, 168. 174, 175
Smith v. Johnson, 87. 98. 137. 171
—— v. Williams, 108, 109
—— v. Wyatt, 50. 59
Sneyd v. Unwin, 118
Soby v. Molins, 99. 101. 109
Somerset v. Fotherby, 265
Somerton v. Dr. Cotton, 184. 189
Somerville v. Wise, 199. 207
Spencer's case, 67
Star v. Elliott, 175
Startup v. Dodderidge, 183. 185. 222
Stathome's case, 175. 177
Staveley v. Ullithorn, 173
Staughton and others v. Hide and another, 80
Stawell, Lord, v. Atkins, 191. 265
Stebs v. Goodlock, 77. 252
Steers v. Brassier, 60
Stephens v. Martin, 60
Stephenson v. Hill, 170
Stockwell v. Terry, 159, 160, 161, 162. 218
Stone v. Ludlow and others, 263
—— v. Rideout, 54. 164
Streaton v. Downes, 58
Strutt v. Baker, 167. 283
Stump v. Ayliffe, 15. 280
Sweetapple v. Duke of Kingston, 205
Swinfen v. Digby, 86
Sydown v. Holmes, 168. 174
Symons, Dr. Burgess, v. 291

T.

Talbot v. May, 46. 216, 217
Tamberlain v. Humphrey, 59
Taswell v. Athill, 65
Tate v. Skelton, 175
Taylor v. Walker, 194. 275. 282
—— v. Wymond, 251
Tennant v. Stubbing, 64. 67. 70
Thomas v. Duke of Beaufort, 111
——— v. Price, 44
——— v. Rees, 69
Thompson v. Holt, 49. 110, 111. 170. 210
Thorpe v. Bendlowes, 96
Torriano v. Legge, 189. 201. 207
Townley v. Tomlinson, 173
Travis v. Chaloner, 275. 283
——— v. Oxton, 187. 203. 272, 273

Trewin v. Bond, 73
Tully v. Kilner, 188
Turner v. Smith, 102, 103
——— v. Weedon and others, 108. 110. 141. 208
——— v. Williams, 87
Turton v. Clayton, 187
Twells v. Welby, 203
Twiss v. Brazen Nose College and others, 55

U.

Udall v. Tindall, 60
Umfreville v. Batchelor and others, 247. 291
——— v. Topping, 151
Underhill v. Durham, 272
Underwood v. Gibbon, 85. 96
Urrey v. Bowyer, 175

V.

Vernon v. Sloane, 262
Vyse v. Duntze, 193

W.

Wake v. Russ, 189. 281
Wallis v. Pain and Underhill, 58. 59. 114
Walrick and Lewis v. Cropton, 57, 58
Walter v. Flint, 227
Walton v. Tryon, 62. 99, 100. 103. 110. 113. 148. 154
——— v. Tyers, 117
Ward v. Hilder, 247
Warren v. Fisher, 197
Warwick, Corporation of, v. Lucas, 164
Waterhouse, Lady, v. Bawde, 253
Waterman v. Jones, 112, 113
Watson v. Smith, 109. 111, 112
Webb v. Gifford, 209
——— v. Warner, 81
Webber v. Taylor, 188, 265
Wheeler v. Heydon, 34
Whieldon v. Harvey, 166. 188
Whitaker and Tiddersdale v. Dr. Leyfield, 150
Whitton v. Weston, 175
Wilbraham v. Saunders, 12
Wilkenson, Allot v. 40
Williams v. Baron, 48, 49
——— v. Cullam, 32. 194
——— v. Ladner, 71
——— v. Petchy, 169
——— v. Williams, 57
Williamson v. Gosling, 245
Willis v. Harvey, 53
Wilson v. Bishop of Carlisle, 66. 140
——— v. Mason, 46
Witherington v. Harris, 62. 82. 102
Wolferston v. Braginton, 84
Wood's case, 255
Wood v. Harrison, 63. 208
——— v. Wray, 197
Woodnoth v. Lord Cobham, 53. 149
Woodshaw v. Hill, 73
Woolaston v. Wright,
Woolferston v. Mainwaring, 210
Wools v. Walley, 263
Worrall v. Miller, 284
——— v. Nichols, 226. 283
Wortley v. Herpingham, 259
Wray v. Clench, 104
Wrights v. Elderton, 62. 127. 144
——— v. Gerard and another, 174
——— v. Powle, 105
Wright v. Wright, 170. 251
Wyburn v. Tuck, 227. 260. 269

Y.

Yate v. Leigh, 281
—— v. Sothby, 262
Yateman, v. Cox, 58
York, Archbishop of, v. Duke of Newcastle and others, 202
———— and Dr. Hayton v. Sir Miles Stapleton, 205. 265, 266

INDEX.

A.

ABBEY LANDS, 171, *et seq.*
Abbeys, see Appendix.
Acorns, 106.
Actions for, or relative to, tithes, 68. 71. 258, *et seq.*
Aftermath, 63.
After pasture, 64.
Agistment, 42. 64. 84. *et seq.* 97. *et seq.* 138.
Agreement by parol for composition, 225. 261.
Alders, 105.
Assart, 13.
Altarage, 55.
Answer, 191.
Appeal, 40.
Apples, 51. 65. 120.
Appropriation, 38.
Articles, thirty nine, 268.
Articuli Cleri, 47.
Ash trees, 101. 105. 107.
Aspen trees, 105.
Assize, 19. 30.
Augmentation office, 271.
Augmentation of vicarages, 55.

B.

Balks, 155.
Baptism, solemnization of, 58.
Baron and feme, 260.
Barren ground, 156. *et seq.*
Bark of trees, 106.
Barley, how tithed, 76.
Bavins, 106.
Beans, 60. 77. 119.
Beech, 101. 105.
Bees, 125.
Bill in equity, 190. 232.
Billetts, 106.
Birch, 105.
Birds, 155.
Birling of sheep, 186.
Bishop, 169.
Boughs, 103.
Bricks, 112. 151.
Broom, 83, 106.
Buck, 153.
Buildings, 112.
Bulls, papal, 271.
Butts, 156.

C.

Calves, 141.
Chalk, 151.
Chancery, court of, 262.
Chancel, repairs of, 37.
Chapelries, parochial, 58
Charcoal, wood converted into, 112. 114.
Charlemagne, emperor, 1, 2.
Cheese, 42. 128.
Cherries, 65. 120.
Cherry trees, 105.
Chickens, 146.
Cinquefoil, 82.
Cistercians, 173.
Clover, 59. 62. 82.
——— grass, 82.
——— seed, 59. 82.
——— hay, 59. 63.
Coach-horses, 96.
Coals, 151.
Coleseed, 60.

Colts, 141. 144, 145.
Common appendant or appurtenant, 89.
Common, in gross, 89.
Composition real, 117. 219. *et seq.*
———— distinction between, and modus, 221.
Composition, 224, 225.
Conies, 95.
Consultation, writ of, 255.
Copper-mill, 47.
Copse-wood, 99.
Copyholder, 21.
Corn, 65, 66, 95.
Corn-mill, 46.
Costs, 283.
County may prescribe *in non decimando*, 170.
Courtesy, tenant by, of tithes, 20.
Cows, 95.
Curacy perpetual, 58.
Curate, 58, 59.
Custom, 67. 157. 148. 216.
——— of tithing lambs, 141. 142.
——— as distinguished from prescription, 184.
Cyder, 125.

D.

Damage feasant tithes, 71.
Day labourer, 43.
Dean and chapter, 169.
Declaration in action for tithes, 269.
Decree, 278.
——— in exchequer, 266.
——— in chancery, 266.
Debt, sequestration for, 35.
Deed, when it proves itself, 278.
Deer, 95.
Definition of tithes, 12.
Depositions, 129. 273.
Devise, 33.
Dilapidations, 37.
Discharge, 164. 183.
Distraining of tithes, damage feasant, 71.
Division of tithes, 138.
Dogs, 155.
Doe, 153.
Dotards, 102.
Doves, 49.
Dower in tithes, 20.
Draining lands, 159. 161.
Ducks, 145.

E.

Easter offerings, 48.
Eggs, 42. 145, 146.
Ejectment, 258.
Elm, 101. 105.
Endowment of vicarages, 55, 56.
Equity, courts of, 262. *et seq.*
Evidence, 129. 148, 149. 267. *et. seq.*
Evidence of endowment, 56.
Exchequer, court of, 262. 266.
Executor, 16. 260.
Exemptions general, 164.
———— partial, 183.
Exotics, 120. *et seq.*

F.

Faggots, 107.
Farm modus, 184.
Fences, 108. 111.
Fens, 161.
Ferœ Naturæ, animals, 48. 95. 125. 152.
Fern, 83.
Fire-wood, 110.
First fruits, 16.
Fish, 44. 48. 50. 152.
Flax, 50. 84.
Fleeces of wool, 136.
Fodder, 60. 81.
Forced fruits, 120.
Forest, 13.
Forfeiture, 263.
Fossils, 152.
Fowls, 145.

Fraud, 139.
Fruit, 59. 107. 118.
Fruit trees, 106. 120.
Fuel, 65. 93. 107. 118.
Fulling-mill, 47.
Furze, 83, 84.

G.

Garba, 55. 61. 75.
Gardens, 124.
——— herbs, 59. 118.
Garden, penny, 210.
Geese, 145.
Germins, 103. 109.
Glass-house, 47.
Glebe, 170.
——— vicar endowed with part of, 57
Grain, 65, 66.
Grass, 65. 79. 81.
——— tedding of, 200, and Appendix.
Green articles cut, 60. 81. 83.

H.

Hay, 65. 79. 95.
—— mode of tithing, 79. *et. seq.* see also Appendix.
Hazle, 105.
Head-lands, 156.
Heath, 83. 156.
Hedges, 108.
Hedge rows, 106.
Hemp, 84. 114.
Hens, 145.
Herbage, 200.
Holly, 105.
Home consumption, 47 in not. 65. 81. 95. 119, 120. 137. 152. in not. 153.
Honey, 125.
Hop-poles, 109. 111.
Hops, 59. 114. *et seq.* 124.
Hot-house plants, 120.
Hornbean, 101.
Horses, 95.
——— saddle, 96.
——— coach, 96.
Horse-chesnuts, 105.
Hospitallers, 172.
Houses, 150.
——— in London, 230. *et seq.*
Hundred may prescribe in *non decimando*, 170.
Hurdles, 109.

I.

Impropriator, lay, 16. 22.
Inclosing act, 181. 214. 218.
Incumbent de facto, 15.
Injunction, 251.
Inn-keeper, 43. 96, 97.
Inspeximus, 276.
Interest of money, 43.
Issue, 56, 57. 129. 203. *et seq.* 265.
——— who to be plaintiff in, 148. *in not.*
Jurisdiction, 248.

K.

Kids, 141.
King, 14. 168.
—— lessee of, 168.
Knights of St. John of Jerusalem, 174.

L.

Lambs, 137. 141. 145.
Lateran, council of, 5. 173.
Lead-mill, 47.
Leases of tithes, 24. 32.
——— of rectory, 34.
Lime, 151.
Limes, 105.
Limekiln, 154.
Limitation of time, 29. 165. 270.
London, tithes in, 229. *et seq.*
——— fire of, 232.
Loppings, 65. 101.

M.

Madder, 59. 84.
Map, when evidence, 277.
Maple, 101.
Marl, 151.
Marches, 161.
Mascon, council of, 2.
Mast, 106.
Melons, 120.
Meres, 156.
Milk, 42. 87. 126. *et seq.*
—— setting out tithe of, 129. *et seq.*
Mills, 44, 48. 216, 217.
Mines,
Mixt tithes, 41.
Modus, 117. 124. 164. 183. *et. seq.*
——— requisites of, 184. *et seq.*
——— stating in bill in equity, 190.
——— stating in answer, 191.
——— bad, 207.
——— valid, 209.
——— discharge of, 215.
Monasteries, 171. *et seq.* 270 and Append.

N.

Nice, council of, 26.
Nonæ et decimæ, 3.
Non decimando prescription, &c. 167, 168.
Non-payment of tithes, 164. 280.
Non-residence, 39.
Notice of setting out tithes, 67.
——— to determine composition, 123. 226, 227, 228.
Nursery plants, 65. 107.

O.

Oaks, how tithed, 76. 102.
Offerings, Easter, 48.
Orange trees, 120.
Orchards, 64, 107. 120. 124.
Orders, privileged, 172. 177.
Ore, 152.
Osiers, 109.

P.

Paper-mill, 47.
Park, 153. 216.
—— disparked, 216, 217.
Parish, 8.
Parish-church, 8.
Parochial modus, 184. 215.
Parson, 13.
Partridges, 146.
Parties in a suit for tithes, 264.
Pears, 65. 120.
Peas, 60. 77. 119.
Personal tithes, 41. 43. 147.
Pheasants, 146.
Pigeons, 49.
Pigs, 141. 144.
Pine apples, 120.
Portion of tithes, 17.
Plough, beasts of, 92. *et seq.*
———— reared for or pail, 42. 95.
———— when tenant changes his mind relative thereto, and sells them, 42.
Pollards, 101.
Potatoes, 50. 59. 61. 119.
Pot-earth, 151.
Poultry, 145.
Predial tithes, 41.
Premonstratenses, order of, 172.
Prescription, 168, 169.
———— as distinguished from custom, 184.
Priest, 15.
Privileged orders, 172.
Prohibition, 254, *et seq.*
Purpresture, 14.

Q.

Quakers, 286.
Quarries, 151.

R.

Rabbits, 152, 153, 154.
Rakings, 74.
Rankness of modus, 202. *et seq.*
Rape-seed, 83. 223.
Receipts, 281.
Recovery of tithes, 248.
——— of small tithes, 286.
Rector, ecclesiastical, 15.
——— lay, 15.
Rents, 21. 31. 233, 234.
Repairs, 37. 112.
Roots, 59. 103. 118.

S.

Saddle-horses, 96.
Saffron, 60, 62. 114.
Saint John of Jerusalem, Knights of, 174.
Salt, 152.
Saplings, 108.
Seeds, 50. 59. 118.
Sequestration, 35—40.
Sequestrator, 35.
Sepulture, rites of, 8. 58.
Setting out of tithes, 41. 66. *et seq.*
Shaving-mill, 47.
Sheep, 95. 136.
—— shearing of, 136. 138.
Shrouds of trees, 102.
Slates, 152.
Small tithes, 50.
Spiritual court, 248. *et seq.*
Statutes.
1 Ann. St. 1. c. 7., 14.
28 H. VIII. c. 11. s. 3., 15.
42 Geo. III. c. 43., 18.
32 H. VIII. c. 7., 19. 22.
Enabling and restricting statutes, 24.
5 Geo. III. c. 17., 25. 30.
3 Car. I. c. 4., 28.
43 Geo. III. c. 84. s. 10. 28.
52 H. III. c. 15., 29.
8 Ann. c. 14. s. 4., 30.
29 Car. II. c. 3., 32.
13 Eliz. c. 20., 39.
43 Geo. III. c. 84., 39.
2 and 3 Ed. VI. c. 13., 41. 43. 48. 66. 89. 130. 253.
Articuli Cleri, c. 5., 44.
1 Geo. II. c. 12., 59.
31 Geo. I. st. 2. c. 26., 84.
45 Ed. III. c. 3., 100.
2 and 3 Ed. VI. c. 13. s. 5., 156. 258. 262.
2 Hen. IV., 173.
27 Hen. VIII. c. 28., 174.
31 Hen. VIII. c. 13., 174.
27 Hen. VIII. c. 21., 229.
37 Hen. VIII. c. 12., 230.
22 and 23 Car. II. c. 15., 232.
9 Ed. I. a writ of *circumspecte agatis*, 250.
27 Hen. VIII. c. 20., 253.
32 Hen. VIII. c. 7., 253, 258.
31 Hen. VIII. c. 13., 270.
32 Hen. VIII. c. 24., 270.
7 and 8 W. III. c. 6. 286.
Stone, 151.
Stools, 103.
Substance of earth, 151.
Subtraction of tithes, 250. 258. 262.
Suggestion in prohibition, 254.
Summary method of recovering small tithes, 286.
Successor to living, 15, 16.
Swans, 145.
Sylva Cædua, 62. 98. 106.

T.

Tares, 60. 83.
—— cut green, 60.
Teazle, 60.
Tedding grass, 200.
Temporal courts, 248. 254. *et seq.*
Templars, 172. *et seq.*
Tender, 283.
Terrier, 275.
Tile, 151.
Timber, 101.

Tin, 151.
Tithes, establishment of, on the Continent, 2.
Tithes in England, 6.
——— definition of, 12.
——— predial, personal, and mixt, 41.
——— great and small, 50. 59, 60
——— rectorial and vicarial, 30. 51.
——— removal of, 77—79.
——— non-payment of, 164.
Tobacco, 114.
Toppings, 65.
Tradition, 150.
Treble value of tithes, 259, 263.
Trees, 101.
——— stools of, 103.
Turf, 151.
Turkeys, 146.
Turnips, 60. 62. 86. 119.

V.

Vacancy of, benefice, 39.
Vendor and vendee of wood, 113.
——————— of corn, 261.
Vetches, 83.
Vicar, 51. 53.
Vicarage, 51.
——— endowment of, 51. *et seq.*
——— dissolution of, 53.

U.

Uberiores Decimæ, 86. 92. 109.
Underwood, 99.
Unity of possession, 175. *et seq.* 219. 271.

W.

Waste, 156. 158.
Wax, 125.
Way, parson's right of, to remove his tithes, 77, 78. *et seq.*
Wheat, mode of tithing of, 72.
Willows,
Witness, 149. 282.
Woad, 60.
Wood, 62. 98. 113.
Woodlands grubbed up, 161.
Wool, 42. 66. 87, 88. 135. *et seq.*

Y.

Young of animals, 42. 87. 95. 141. 145.

THE END.

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